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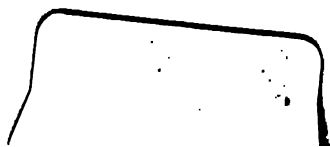
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WITH SPECIAL REFERENCE TO THE

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HUGH BARCLAY, LL.D.,

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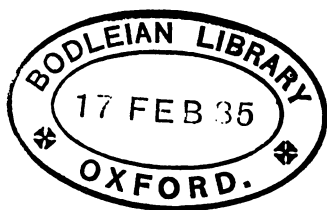
BY  
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PROFESSOR OF PUBLIC LAW IN THE UNIVERSITY OF EDINBURGH

*Fifth Edition*

BY  
RUSSELL BELL  
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"Potius ignoratio juris litigiosa est, quam scientia"  
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## PREFACE TO THE FIFTH EDITION.

THE Editor has in this edition followed substantially the same course as in the last one, namely, added to and altered the text to bring it into conformity with the present state of legislation and decision so far as the limits of the work permit. In doing so he has found the requisite changes on the text to be rather more extensive than in the last edition. The chapter on Bills and that on Patents have, in consequence of the recent Acts affecting those subjects, with the exception of a few sections, been entirely rewritten, and somewhat enlarged. On the other hand, the Marriage Notice Act has been given in rather less detail than before; and the subjects of Death-bed, Conquest, and Burgage Tenure, which had ceased to form parts of the law before the date of the last edition, have been eliminated altogether from this one. In view of the great simplification wrought in the law of Entail by the culminating Act of 1882, the Editor has not considered it necessary to retain the chapter on Entail (which consisted, in previous editions, chiefly of an analysis of the Rutherford Act) in its former length, but has, with the exception of some introductory sections, inserted instead a new and shortened account of the present state of the law.

The chapter on Bills has had the advantage of revision by Mr. W. D. Thorburn, Advocate, author of a Commentary on the Bills Act; that on Patents, of Mr.

Dugald M'Kechnie, Advocate, editor of the third edition ; and the pages on the Employers' Liability Act, of Mr. John David Sym, Advocate, author of a Handbook of the Act. To these gentlemen the Editor begs to acknowledge obligation.

It has been found necessary again to alter the numbering of the sections. The new matter will be found bracketed [ ] as in the previous edition.

26 NORTHUMBERLAND STREET,  
*December 1884.*

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## PREFACE TO THE FIRST EDITION.

WHEN a popular book on a professional subject is presented to the public by a professional man, it is usual for him to preface it with an apology for its existence ; and were his object either to diminish the scientific exactitude of professional study, or to open the practice of a profession to those who have received no special training, there would be reason for an apology, if indeed any apology could avail. But the case, I trust, is very different where all that has been attempted, as regards practice, has been to furnish the means of encountering, with confidence and serenity, those occurrences in which the non-professional person *must* act without professional aid ; and as regards study, to afford a general view of the subject, and a guide to more recondite sources of information. These are the objects which I have endeavoured to keep exclusively in view in the preparation of this work ; and I therefore believe

with some confidence, that whatever may be its other defects, it will not be found to have overstepped the legitimate province of the class of works to which it belongs.

In a book intended for practical application in emergencies, the first requisite is, that the rules enunciated shall be safe; and this I have endeavoured to ensure by drawing only from acknowledged sources. To have enumerated my authorities in every instance would have been needlessly to encumber the pages of a popular treatise. Who they are, and where their dicta are to be found, my professional brethren will discover without difficulty, and the non-professional reader will not care to know. It may be proper, however, to state, that wherever I have adopted the opinion of an individual, however eminent, I have mentioned him by name; and where I am silent as to authority, the reader may assume, either that the doctrine as stated has been formerly affirmed by a decision, or that it is recognised as trite law by text-writers of unquestionable reputation. The second requisite in such a work is, that the doctrines shall be stated with such precision and brevity as to exclude the possibility of misapprehension. Of the success with which the requirement of precision has been satisfied, I can express no opinion; but, as regards brevity, I may mention, that in an undertaking of which the sole object was utility, and in which originality would have been a fault, I have endeavoured to earn such credit as it might yield by condensing, on almost every occasion, even where I have not otherwise altered, the expressions of former writers.

In addition to the two classes of persons whose requirements *I have had primarily in view*—viz. the

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to more complicated arrangements, either in philosophical accuracy or practical usefulness, it is for others to determine.

Before concluding, I must avail myself of this opportunity to express my very sincere thanks to those friends who have lent me their encouragement and their aid. To Mr. Fraser, Advocate, I am indebted not only for originally suggesting the undertaking, but for much valuable advice and assistance during its prosecution; and Mr. Sheriff Hallard, and Mr. J. R. Stodart, W.S., by giving me the benefit of their knowledge and experience, the one as a Magistrate and the other as an Agent and Practical Conveyancer, have enabled me to present it to the public, if not with confidence, at least with far less hesitation than I should otherwise have felt.

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# INTRODUCTION.

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## OF THE LAW OF SCOTLAND.

1. THE customs which spring from the notions of right and wrong of a rude and simple community, form the groundwork of the legal arrangements of Scotland, as of every other nation.

2. These customs, modified and supplemented by the increased experience, the growing requirements, and the external relations of each generation, and defined by the enactments of the Legislature and the decisions of the Courts, constitute the law of Scotland as it now exists.

3. In the earliest form in which it has been transmitted to us, the law of Scotland bears a close analogy to that of Anglo-Saxon England, and of the other nations of Northern Europe which were peopled by Teutonic races. Amongst the external causes which have modified it at a more recent date, there are two which may be singled out as the most important: the intimate connection which subsisted for several centuries between this country and the continent of Europe, more particularly France; and the Union with England.

(1st.) To the French connection, which at one time amounted to actual internationalization (1558, c. 66), we trace a large infusion of the principles of the Roman civil law into our law of marriage, of guardianship, of contracts, and the like; and the adoption of several judicial arrangements peculiarly French, such

as the constitution of the College of Justice on the model of the Parliament of Paris, and the institution of a public prosecutor of crimes.\* Similar effects must have been produced by the custom of our lawyers resorting for instruction to the universities of Italy and Holland.

(2nd.) To the Union we ascribe the assimilation which has already taken place, and which is daily going on, between the laws of Scotland and England. This assimilation has hitherto been most perceptible in the different departments of our mercantile law and in our law of evidence.

4. The statute law of Scotland divides itself into two distinct and, in many respects, dissimilar portions; the first having been enacted by the Parliament of Scotland previous to the Union, the second by the Parliament of Great Britain.

5. A third division has commonly been made between that which is prior and that which is subsequent to the reign of James I.; the authority of statute law in the stricter sense being confined to the latter, whilst the former is held "gradually to have lost its force, because not having been preserved from interpolation by any public record." (Ersk. i. 1, secs. 36, 37.)

6. In this view, the earliest statute now in force is the 11th of the First Parliament of King James I. (1424), "Of Cruves, Zaires, and Satterdaies Slop," as interpreted by the Act 1477, c. 73, "Anent Cruves." In both of these Acts reference is made to an "old statute made by King David," requiring that "ilk heck of the foresaidis Cruves be three inche wide." It thus happens, by a singular chance, that this unimportant regulation

\* Much of the legal and official terminology by which the law of Scotland is distinguished from that of England, and which it possesses in common with the legal and judicial systems of the Continent, is to be ascribed to the same cause. The *overture* of the French Estates still lives in the overtures of our ecclesiastical courts; the English mayor with us becomes a provost or *prévôt*; the alderman becomes a *baillie*, the barrister an advocate or *avocat*, the agent a procurator or *procureur*, and the like.

as to the mode of catching salmon is the oldest statutory provision now in force in Scotland.

7. In some respects the early legislation of Scotland was advanced beyond that of conterminous and contemporary nations. The important Act by which agricultural leases are made effectual against the successors of the grantor was passed in 1449 (c. 18); and the Act establishing the prescription of obligations by the lapse of forty years, in 1469 (c. 28). In opposition to the English view, it has always been held that the ancient statute law of Scotland may be repealed by desuetude (Stair, B. i. tit. i. 25, note *a*, Brodie's ed.; Ersk. i. tit. i. 45, notes 12, 13, Ivory's ed.); and the circumstance to which the old statutes which we have mentioned owe their binding force at the present day, is consequently not that they were once enacted, but that they have been in continual observance, and are still in accordance with the requirements of the community.

8. The Acts of Sederunt, or ordinances made by the Court of Session for regulating the forms of proceeding to be observed in actions, are likewise regarded as a part of the written law of Scotland; the Court having a delegated power from Parliament to "make sike actis, statutes, and ordinances, as they sall thinke expedient, for ordouring of proces, and haistie expedition of justice." (1540, c. 93.)

## BOOK I.

## OF THE FAMILY RELATIONS.

9. The family being the original seat of legal as well as of moral rights and duties (Arist. politic. i. 4-6), it has been customary with lawyers to give to the relations which subsist between its members, and the obligations which spring from them, precedence over those between the members of the same or separate communities simply as such.

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## CHAPTER I.

## OF HUSBAND AND WIFE.

## I. OF THE CONSTITUTION OF MARRIAGE.

10. Marriage, in the eye of the law of Scotland, as of that of Rome, is a civil contract, constituted, like every other civil contract, by consent. (Ersk. i. 6. 2; D. lib. 50, tit. 17, l. 30, and lib. 35, tit. 1, l. 15; Confess. of Faith, xxiv. 3. But see Fraser, Husband and Wife, p. 155 *et seq.*)

11. Nor does the fact of consent to this contract require to be established by any peculiar civil solemnities, but admits of being proved by ordinary evidence, either parole or written. (Ersk. i. 6. 5 and 6; Fraser, 294 *et seq.*)

12. Fully alive, however, to the peculiar importance of this contract, of which Lord Stowell has justly said (Dalrymple v. Dalrymple, 2 Hagg. p. 63) that it is the "parent, not the child, of civil society," the law of Scotland has always watched with

care over the *completeness* of the evidence by which it is to be established. Moreover, the circumstance of its being constituted in the same manner does not place the contract of marriage in all respects on a footing of equality with other contracts. Being, as Lord Stair observes, "a divine and human contract," the obligations arising from it are not those which "take their rule and substance from the will of man" (Stair, i. 4. 1.) It cannot, for example, be arbitrarily limited in its duration (ib. i. 4. 5); it cannot be so framed as to depend on the relative position which nature has assigned to the parties; it cannot be entered into by parties within certain degrees of relationship (Confess. of Faith, xxiv. 4), and the like.

In consequence of this peculiarity in its nature, there are many impediments to marriage which are not impediments to the formation of other contracts. In other respects, the following observations are general, and may be regarded as a statement of the principles by which all contracts are governed.

*Legal consent* must be voluntary and intelligent; and persons who are either actually, or whom the law presumes to be incapable of such consent, are consequently incapable of marriage. (Stair, i. 4. 6; Ersk. iii. 1. 16; Fraser, 415.) The Roman Law held that a pupil could marry, if able to procreate; but our law has not accepted that principle.

For this reason, neither idiots, madmen, nor pupils can contract marriage; and a marriage will be invalidated by fraud, force, fear, or substantials, or extreme intoxication. (Fraser, 51 and Johnston v. Brown, Nov. 15, 1823; and Ferg. Rep. 246; Sullivan v. Sullivan, 2 Hagg. p. 246.)

Twelve in females, and fourteen in males, being the ages at which their pupilarity ceases, are the ages at which they may lawfully marry. This arrangement, which was probably borrowed by us from the Roman law, and which may have been suited to the climate of Italy, can scarcely ever have been of any inconvenience in this country. It is to be remarked,

however, that twelve was the legal age of majority for certain public purposes among the Anglo-Saxons, and seems to have been so generally amongst the Teutonic tribes. (See Kemble's Saxons in England, vol. ii. p. 35, and note.)

17. Extreme youth of one of the parties, even where the years of pupilarity have been passed, has always been regarded in Scotland as raising a presumption that he has been the victim of fraud; and circumstances which, in the case of persons more advanced in life, would not be listened to, will be regarded as important in judging whether a very young person has given that free and intelligent consent which alone constitutes marriage. (*Cameron v. Malcolm*, M. 12,586; *Allan v. Young*, Dec. 9, 1773, Ferg. Rep. p. 37; and *Fraser*, 51.)

18. Persons above the age of puberty can marry without the consent of their parents or guardians; but if under the age of puberty, their marriage, even with such consent, is not valid.

19. The consent which constitutes marriage must be to a *present* act; and, consequently, all ante-nuptial contracts, sponsalia, and other promises to marry, whatever may be the form of their expression, may be resiled from. (*Stair*, i. 4. 6; *Ersk.* i. tit. 6. 3; *Fraser*, 484 *et seq.*) They then become grounds for actions of damages.

20. Where the promise has been followed by sexual intercourse, the Court, on proof of both, will declare that the marriage has actually taken place; because, though the promise was only to marry at some future date, yet the intercourse is presumed to have been consented to only on a present interchange of consent. The promise, when founded on for this purpose, can be proved only by the writ or oath of the defender; but when founded on for the purpose of securing damages only, it may be proved like any other fact. (*Fraser*, 322 *et seq.*) To constitute marriage, the promise must have been given and the copula have commenced in Scotland, and

the latter must be connected with the former. (Longworth, 1864, 2 M. H. L. 49.)

21. It has been keenly discussed amongst lawyers, whether promise followed by copula is itself a completed marriage, or is only a ground on which either of the parties may force the other to complete a marriage, by raising an action the object of which is to call upon the Court to *declare that it is already completed*. This absurd question, which, if answered in accordance with the second alternative, assumes that the Court can add to the consent of the parties, is still seriously agitated, and may come to be of great importance in determining the legitimacy of children, if raised after a second marriage, or after the death of either of the parents has rendered solemnization impossible. Apart from the confusion in which the subject is usually involved by the manner in which it is discussed, it seems plain that the promise and copula are simply tokens of consent which the law recognises, that the declarator can go no further than to determine whether or not they are present in the special case, and consequently that the date of the marriage is the date of the copula. The best informed opinion seems to be, that marriages of this kind required to be *declared*; for, at best, the consent is merely an inference from the behaviour of the parties. The result of a declarator being necessary, is that the marriage could not be set up to any effect after the death of one of the parties. (Lord Moncreiff's opinion in *Browne v. Burns*, June 30, 1843, 5 D. 1288.)

22. It is competent, where there has been sexual intercourse, to insert in the summons of an action of declarator of marriage by the woman, an alternative conclusion for damages for seduction. (Fraser, 504.)

## II. OF REGULAR MARRIAGE.

23. The ordinary form in which express consent is given, in Scotland as elsewhere, is by a solemn vow of the parties,

uttered before a clergyman, in the presence of at least two witnesses.

24. It is not the practice for Presbyterian marriages to be celebrated in church, though the Westminster Directory requires that they shall be publicly solemnized by the minister "in the place appointed by authority for public worship." To the civil law, the place of celebration is a matter of perfect indifference.

25. A regular marriage must be preceded by the publication of banns.

26. This proclamation, by which a purpose of marriage is announced, and all concerned are required to state any valid objection which they may know to the proposed union, takes place in church, when the people are met for divine worship, either on three several Sundays, or (as is now more usual) three times on the same Sunday. The session-clerk cannot proclaim banns until the parties have resided six weeks in the parish. (Act of Assembly viii. 1784; Ersk. i. 6. 10.) Where the parties reside in different parishes, proclamation must be in both. (Act of Assembly 1699, c. 5; and Regulations of 1782 and 1784, c. 8; see also Cook's Styles of Procedure, p. 32.) In populous parishes, where the session-clerk must often have no personal knowledge of the parties, they must bring him a certificate, signed by two householders or by an elder, stating that one or both of them have been residents in the parish for six weeks or more, and that they are unmarried. (Cook's Styles of Procedure in Church Courts, p. 33.) It has been decided that banns are *inter sacra*, and, for persons residing in districts erected into *quoad sacra* parishes under 7 and 8 Vict. c. 44, fall to be proclaimed in the *quoad sacra* church. (Hutton, 1875, 2 R. 893; aff. 3 R., H. L. 9; Fraser, 286.)

27. The proclamation of banns is now—from 1st January 1879 (41 and 42 Vict. c. 43)—no longer the sole legal form of preliminaries to a regular marriage, and, in place of the production of a certificate by the session-clerk of their due proclama-

tion, it is now lawful for a clergyman of any Church to celebrate a marriage, which shall be deemed a *regular* marriage, on production of a certificate by the registrar of the parish or district of the publication of notice of marriage according to the requirements of the Act.

28. The parties must give notice of their intention to the registrar of the district in which he or she has resided for fifteen days previously, one notice sufficing where they reside in the same district. The notice is then entered in the Marriage Notice-Book, and posted in the registrar's office for seven days, at the end of which time, if no objections to the marriage have been stated to him, it is his duty to issue to the parties a certificate of publication of notice, which shall be of equal validity with that of a session-clerk of the proclamation of banns in authorizing a clergyman to marry the parties producing it; but no minister of the Church of Scotland shall be *obliged* to celebrate a marriage unpreceded by the due proclamation of banns. If no marriage takes place within three months of the date of the certificate, the latter becomes void.

29. *Registration*.—It is required by 17 and 18 Vict. c. 80, that in all cases of regular marriages, when the certificates of the proclamation of banns are given out, they shall be accompanied by a copy of the schedule (C.); and that, upon the solemnization of the marriage, such schedule, having all the information thereby required inserted, shall be produced to the minister, or the person solemnizing the marriage according to the rites of Jews or Quakers; or shall be filled up in the presence of the minister, and signed by the parties contracting the marriage, and by the witnesses, male or female, present thereat, not being less than two, and also by the minister; and shall be delivered to the parties, who, within three days, shall either deliver it or send it by post, to the registrar of the parish wherein the marriage was solemnized. (Sec. 46.)

30. In an English Act (19 and 20 Vict. c. 119) it is provided

that, where one of the parties intending to marry without licence is resident in Scotland, a certificate of proclamation of banns in Scotland, by the session-clerk, shall be valid and effectual for authorizing the solemnization of marriage in England. (Sec. 8.) There is no reciprocal Act; but the invariable practice in Edinburgh is to make the proclamation if one of the parties has been resident for the requisite period. The same rule is followed in the case of soldiers and sailors.

31. *Dissenters*.—Till a recent period, only the clergy of the Established Church of Scotland could celebrate regular marriages. The statute 10 Anne, c. 7, allowed Episcopal clergymen, who had taken the oaths to Government, to do so; and this privilege was extended by 4 and 5 William iv. c. 28, to all persons in holy orders, of whatever communion, after proclamation of banns in the Established churches of the parishes of both parties. In the case of Episcopalians, the statute requires that proclamation shall also be made in the chapel.

32. The form of the marriage service, both in the Presbyterian and Episcopalian Churches, is in strict accordance with the principle of the marriage being the result, not of the ceremony, but of the expressions of mutual consent. In the Presbyterian Church the clergyman declares the parties to be married; in the Episcopal Church he is instructed to say, "Forasmuch as these two have *consented together*, I pronounce that they be man and wife together."

### III. OF IRREGULAR AND CLANDESTINE MARRIAGE.

33. All marriages which are not celebrated by a clergyman after proclamation of banns, are irregular; and such of these irregular marriages as are entered into before a person professing to act as a religious celebrator, without being a minister of religion, or by a minister of religion without proclamation of

banns, are clandestine, and expose the parties, the celebrator, and the witnesses, to certain penalties. (Fraser, 250.)

34. Express consent may be either in words before witnesses, or in writing by the parties. No particular form is required either for a verbal or written declaration, the only indispensable requisite being, that the fact of present resolve shall be rendered indisputable. But mere *words* of present consent are not sufficient to constitute marriage where the general circumstances at the time and the subsequent conduct of the parties is inconsistent with the belief that they are married. (Robertson, 1874, 1 R. 532; rev. 1875; 2 R., H. L. 80; Fraser, 424.)

35. A single example in illustration of the preceding section may be given. In one case, the parties had corresponded during a period of upwards of thirty years—first as “betrothed husband” and “betrothed wife,” and then as “husband” and “wife.” No one ever knew of their being married; and the man, who was a minister of the Church of Scotland, subscribed to the Widows’ Fund, and registered himself as a bachelor. No *copula* was proved. After the man’s death the woman brought a declarator of marriage, founding on the correspondence, and the Court found that the marriage was proved. (*Leslie v. Leslie*, March 16, 1860.)

36. Matrimonial consent will be inferred from “habit and repute,” that is, from cohabitation of the parties, and from their having the reputation of being married. (Stair, i. 4. 6, iii. 3. 42; Fraser, 391 *et seq.*) The cohabitation must have been in Scotland (Ersk. i. tit. vi. note to Ivory’s ed. p. 122); and the repute must not be founded on a single circumstance, or confined to a few individuals, but must be general in the neighbourhood, unequivocal, consistent throughout, and of considerable duration.

37. If the connection has begun in concubinage or adultery, a very palpable change of purpose, and in the case of adultery a clearly established *repute of marriage after the impediment has*

been removed, will be required in aid of the proof of public opinion. (Campbell, 1866 ; 4 M. 826 ; aff. 5 M., H. L. 115.)

38. By 19 and 20 Vict. c. 96 it is enacted, "That, after the 31st December 1856, no *irregular* marriage shall be valid in Scotland, unless one of the parties has lived in Scotland for the twenty-one days next preceding the marriage, or has his or her usual residence there at the time." It is further enacted, that the parties to such a marriage may apply within three months, *jointly*, to the Sheriff or Sheriff-Substitute of the county for a warrant to register it. Upon proof that one of them had lived for twenty-one days, or had his usual residence in Scotland, and that they have contracted marriage, the Sheriff is to grant a warrant to the registrar of the parish to record the marriage. A certified copy of the entry, signed by the registrar, which he is bound to give for 5s., is declared to be evidence of a valid marriage.

#### IV. OF THE IMPEDIMENTS TO MARRIAGE.

39. There are certain incapacities to marriage which do not affect other contracts.

40. Impotency, being an incapacity to perform the duties of this contract, is a bar to its formation. Impotency cannot be pleaded by a third party. (Bell, Prin. 1524 ; Hume, Com. 456.) When judicially established by either of the parties themselves, it is held by the Court to be a ground, not for dissolving the contract, but for declaring that no contract ever existed. (Ersk. i. 6. 7 ; Fraser, 80 *et seq.*)

41. Previous marriage, whilst subsisting, forms an incapacity, which will not be removed by the fact that the party may have believed in its dissolution by the death of his partner. (Dalrymple v. Dalrymple, 2 Hagg. p. 63 ; Fraser, 135.)

42. Adultery is a statutory impediment to marriage between the adulterers. (1600, c. 20.) As to whether this statute is in desuetude, see Fraser, 140 *et seq.*

43. Relationship within certain degrees, either of consanguinity or affinity, renders the parties incapable of contracting matrimony.

The forbidden degrees are the following :—

1. Ascendants and descendants—*i.e.* parents and children, grandparents and grandchildren, etc., to the most distant degree.
2. Collaterals in the first degree—*i.e.* brothers and sisters.
3. Collaterals who stand *in loco parentis*—*i.e.* where the one party is brother or sister to the direct ascendant of the other ; thus one cannot marry his grandniece though he is as far removed from her in degree as are first cousins.

44. There is no difference between full and half blood.

45. The degrees which are prohibited in consanguinity are so in affinity.

46. The question of the validity of a marriage with the sister of a deceased wife has been decided in Scotland in the negative (Fenton, January 24, 1861); the Court holding that such marriage is not lawful according to the statute law of Scotland, and the issue are illegitimate, the relationship by affinity being the same as by consanguinity. This is the only case, however, in which this important point has come up for decision in the Scotch Courts, and from the specialties of the case cannot safely be regarded as finally setting the matter at rest. (See Lord Deas in the above case, and Fraser, 124 *et seq.*) The connection, when occurring in the wife's lifetime, has been held to be incest by the Court of Justiciary. (John Oman, Inverness, April 14, 1855 ; Irvine, ii. p. 149.) But the sentence of transportation for fourteen years which was pronounced in this case, was remitted, on application to the Home Secretary, conditionally on the panel not living in Scotland during that time.

V. EFFECTS OF MARRIAGE ON THE PERSONAL STATUS  
AND PROPERTY OF THE SPOUSES.

47. In the eye of the law, the person of the wife is sunk in that of the husband. It is in obedience to this principle that she assumes his name and rank, that she becomes legally subject to him in all domestic and conjugal affairs, and that he is her curator, with powers in some respects more extensive than those which belong to the curator of a minor. With the exceptions mentioned in the following section, the husband is still the sole and absolute manager of the proceeds of the heritable property of the wife, and of the common fund which is created by the union of the moveable property which belonged to the spouses before, or which may accrue to them during, the marriage. (Fraser, 507.)

48. This doctrine was somewhat modified by the 16th sec. of the recent Conjugal Rights Act (24 and 25 Vict. c. 86), which provides that, "when a married woman succeeds to property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband and his creditors, or any person claiming under or through him, shall not be entitled to claim the same as falling within the *communio bonorum*, or under the *jus mariti*, or husband's right of administration, except on condition of making therefrom a reasonable provision for the support and maintenance of the wife, if a claim therefor be made on her behalf;" and, in case of desertion, by the 1st sec., which empowers the wife in such circumstances to apply for an order of Court to protect such property as she has or may acquire by her own industry, or which she may succeed to, against her husband and his creditors. It has been held competent for a wife suing an action of separation *a mensa et toro* to conclude for the provision in sec. 16 in her summons. By 37 and 38 Vict. c. 31 such applications may be made to, and orders of protection granted by, the Sheriff. Now by 40 and 41

Vict. c. 29 the husband's *jus mariti* and right of administration are excluded from all earnings of his wife's industry, in whatever way acquired during the marriage, in any business carried on by her in her own name. [The Act applies only to the wife's "earnings," and not to the stock-in-trade from which the earnings are made. (Ferguson, 1883, 11 R. 261.) For the further extension of the law by the recent Married Women's Property Act, see secs. 134-141, *infra*.]

49. The personal obligations of married women are invalid; and consequently they cannot, except in virtue of the powers conferred on them by the statute just referred to (24 and 25 Vict. c. 86), grant bonds, bills, or promissory notes. Even where a bill granted by a woman before marriage was discharged, and renewed by another bill after marriage, the renewed bill has been held not effectual against her. (Stair, i. 4. 16; Ersk. i. 6. 22; Fraser, 519 *et seq.*; Balfour v. Ewing, Mar. 5, 1831.)

50. The husband's consent will not validate the wife's obligation, because he cannot authorize her to shake off the disability which the law has imposed. But in certain cases,—as, for instance, a bond by the wife over her separate heritage,—the husband's consent will give legal completeness to the obligation, when coupled with the ratification of the wife out of the presence of the husband and before a judge. (Ersk. i. 6. 27; Fraser, 820; Menzies's Lectures, p. 37; Clerk v. Gibson, Jan. 24, 1826.)

51. The object of this ratification is to protect married women against the risk of being unduly influenced by their husbands. Its effect is to raise up a presumption that the deed was the voluntary act of the wife; but it does not seem to cut her off from the allegation, that in granting the ratification itself she was influenced by force or fear; and deeds have been reduced at the wife's instance, though ratified by her. (M'Neill v. Steel's Trustees, Dec. 8, 1829, and Menzies's Lectures, p. 40.) The authorities on this point are divided. In support of the doctrine here laid down, besides those given, are Nicolson's Ersk. i. 6.

35, and note (b), and Mont. Bell, Lect. 126 ; while on the other side are Bell, Com. i. 143, and Fraser, 822, and authorities cited by each. On the other hand, where a wife, with consent of her husband, disposed heritage in security of her husband's debt, but refused to execute a ratification, it was held that the deed was not reducible on the ground of non-ratification, unless force, fraud, or undue influence by the husband was proved. (Ersk. i. 6. 36 ; Fraser, 821 ; Buchan v. Risk, March 1, 1834.)

52. From the wife's inability to enter into obligations, it follows that she cannot sue or be sued at law. (Ersk. i. 6. 21.) This disability continues to subsist even after the dissolution of marriage by the death of the husband, as regards all obligations entered into during its subsistence,—the view of the law being that they never were contracted. But a bond entered into during marriage may be rendered effectual by being acknowledged and acted upon after the marriage has been dissolved. (Ersk. iii. 3. 47 ; Fraser, 566 ; Wemyss v. Stewart, Mar. 2, 1773.) And in case of separation, under the 6th sec. of 24 and 25 Vict. c. 86, the property of the wife belongs to her, exclusively of the *jus mariti* and right of administration, and she may contract and sue and be sued as if she were not married ; [and the same will be the case under the provisions of the Married Women's Property Act of 1881 (*infra*, secs. 134–141).]

53. Though a wife cannot be obliged, she may insist on the fulfilment of obligations which have been entered into with her by others who were aware of her situation. This privilege belongs to married women in common with minors and pupils. Of course the wife must perform her part of the contract to the person whom she thus compels to perform his. (Fraser, 533 ; M'Kenzie v. Fraser, May 18, 1827.)

54. Previous to the passing of the Conjugal Rights Act above referred to, there were certain exceptions to the rule that obligations by married women are null, and these exceptions still remain.

(1.) A contract by a married woman will be effectual against her separate estate, if the subject of the debt has been applied for her own peculiar benefit in a matter which was not legally and properly a debt of the husband. Debts contracted by her before marriage, and moneys expended on improvements of her estate, or expenses incurred in the management of her property, are held to be in this position. (*Harvey v. Chessels*, Bell's Cases, p. 255 ; *Fraser*, 536.)

(2.) A wife can execute a testament as to her separate estate without her husband's consent ; but it is doubtful if she can contract a personal obligation which is not to come into operation till after the marital power has ceased. (*Miller v. Milne's Trustees*, Feb. 3, 1859.) Till recently, her power of testing extended to her portion of the goods in communion ; but by the Act to regulate intestate succession in moveables (18 Vict. c. 22), it is provided (sec. 6) that in case of the wife's predecease, whether testate or intestate, her representatives shall have no right to any share of the goods in communion ; nor shall any legacy, or bequest, or testamentary disposition thereof by such wife, affect or attach to the said goods or any portion thereof.

(3.) Where a wife fraudulently holds herself out to be unmarried, she will be bound. (*Fraser*, 544.)

(4.) It has been held that, where she incurs a fine for a crime which she has committed, her separate estate may be attached for its payment ; but her person cannot be attached, with this object, during the subsistence of the marriage. (*Fiscal of Lanarkshire v. M'Luckie*, Jan. 20, 1796, *Hume's Decis.*) She may be imprisoned as a criminal, but cannot be imprisoned as a debtor for her fine. In order that married women may not be deprived of the benefit of redeeming themselves from imprisonment by the payment of a fine, which would be the practical result of this view of the law, it is said to be the practice in some criminal courts to pronounce a sentence of imprisonment

for a specified time, unless a specified fine be sooner paid. (See Barclay's Digest, *voce* Marriage.)

(5.) Where the husband is civilly dead, *i.e.* where he has been outlawed for not appearing to stand trial for a crime, or where he is absent, and reported to be dead. (Fraser, 545.)

(6.) Where the husband is insane, his curatorial powers are at an end, and the wife may manage and even alienate her property (Ib. 548.) See *ante*, sec. 46.

(7.) Where the spouses live separately, and the wife has an aliment, that aliment may be attached by a creditor for debt which she has contracted *for necessaries*. The husband, having supplied her with a suitable provision, will be free from all further liability. (Ib. 549.)

(8.) Where the spouses are judicially separated, the wife will have a separate aliment allocated to her by the Court; and this a creditor may attach, provided the debt incurred be for necessaries. (Ib. 551; Baillie v. Letham, M. 5998.)

(9.) Where the wife, deserted by her husband, has obtained an order from the Court of Session, under the provisions of 24 and 25 Vict. c. 86, for the protection of the property which she has acquired by her own industry, or to which she has succeeded; or where a married woman, having succeeded to property, has claimed it on her own behalf, under the 16th section of the same Act, the obligations to which she may have subjected such property to third parties will be valid. (Sec. 3.)

(10.) Where a wife has been compelled by ill-treatment to desert the society of her husband, she may incur a debt for necessaries, which will be binding on him; and the same is the rule where she is deserted by him. (Fraser, 638.)

(11.) When the husband is abroad, the obligations of a married woman will be effectual so far as they are for necessaries to herself and her family. If, in order to obtain a livelihood, she should, in such circumstances, commence business as a merchant, keep a tavern, or the like, she may enter into contracts relativ

to such business, and these contracts may be enforced by diligence against her. As soon as her husband returns to the country, the obligations for necessities which she has incurred may be enforced against him, but her powers of independent action cease. If she still continues to trade, she is presumed to do so with his consent, and her deeds are binding, not on her, but on him. (*Churnside v. Currie*, M. 6082; *Orme v. Duffus*, Nov. 30, 1833; *Fraser*, 553.)

55. *Curator ad Litem*.—As a wife cannot sue or be sued in her own name, except under the provisions of 24 and 25 Vict. c. 86, the Court is in use to appoint a *curator ad litem* to supply the place of the husband in cases in which she has a separate interest, or where he will not appear as a pursuer, or cannot be cited as a defender.

56. The general case in which a curator is appointed, is when the husband is insane, abroad, or in banishment, where his residence is unknown, where he refuses unreasonably to concur, or where the wife is obliged to institute an action against him. (*Stair*, i. 4. 15; *Ersk.* i. 6. 21; *Fraser*, 569.)

57. A wife will not be allowed to sue her husband except on necessary or urgent occasions, as for aliment, judicial separation, divorce, or implement of her marriage contract when he is on the verge of bankruptcy. (*Ersk.* i. 6. 21; *Fraser*, 577.)

58. *The domicile of the wife* follows that of the husband, and she must be cited to the court which has jurisdiction over him, except in those special cases in which she can be proceeded against separately. (*Stair*, i. 4. 9; *Ersk.* i. 2. 16, n. 22.)

59. The husband becomes liable for the moveable debts of the wife contracted before marriage, even where she had no separate estate. Amongst her moveable debts are included interest on heritable bonds, or other heritable debts, whether due prior to marriage, or falling due during its subsistence. (*Fraser*, 586.) By 40 and 41 Vict. c. 29 (as regards marriages made after 1st January 1878), the husband's liability for the ante-

nuptial debts of his wife is limited to the amount of property he has received through her at, before, or subsequent to the marriage. [Where a wife at her marriage held shares in a joint stock company, which went into liquidation shortly thereafter her liability to contribute was held to be an "ante-nuptial debt." (Wishart, 1879, 6 R. 823.)]

60. The husband is liable for his wife's marriage clothes, if they are supposed to have been purchased for his peculiar benefit (Neilson v. Guthrie, M. 5878; Alston v. Philip, M. 6007); but he is not liable for her ordinary clothes if she resided in family with her father previous to the marriage. (Bannatyne v. Clark, M. 5860.)

61. Though the husband has renounced his right of administration, and every pecuniary advantage from the marriage, his liability for the debts of the wife still continues; the principle being, that "by marrying her he withdraws her body from personal diligence," and must put himself in her stead. (*Ant* sec. 54. 4.)

62. A debt contracted by the wife after proclamation of banns, but before actual marriage, is held not to be a debt before marriage; and, in so far as the husband is concerned, is null, except to the extent mentioned in sec. 60.

63. The husband continues liable for his wife's debts, even after the dissolution of the marriage, wherever (1) his estate real or personal, has been affected by *complete* legal diligence but diligence against his person has not this effect, (2) so far as he profited by the wife's estate; but even then her own separate estate must first be exhausted. Some say that this doctrine is not well founded, holding that, if decree should be obtained during the subsistence of the marriage, the husband is liable (See Bell's Prin. 1571; Fraser, 592; Elchies' Annot. 21). She is herself decerned against as principal debtor, and the husband for his interest. Execution against the wife is superseded during the marriage. (Ersk. i. 6. 16; Fraser, *ut sup.*)

64. The husband's heritable as well as his moveable property is liable to diligence for this purpose (Ersk. i. 6. 7; Stair, i. 4. 17, Brodie's note); and wherever either moveables or heritage have been actually attached, the death of the wife will not release them. (Ersk. i. 6. 17; Fraser, 595.)

65. Where the wife is possessed of a separate heritable estate, the husband is entitled to relieve himself from it for her debts which he has paid, whether heritable or moveable. (Bell's Prin. 1571; Gordon v. Maitland, M. 11,161.)

66. The rule regarding the heritable debts of the wife is, that the husband is liable for them only to the extent to which he is enriched (*lucratus*) by the marriage. (Ersk. i. 6. 17; Fraser, 597.)

67. A husband who has only received a moderate tocher is not held to be enriched, he being himself regarded as a creditor for a provision to that extent.

68. What is a competent tocher, is a question to be determined according to the circumstances of each case, and when contested is entirely in the discretion of the Court. (Ersk. i. 6. 17; Fraser, 598.)

69. Even after the dissolution of the marriage, the husband continues to be liable for the wife's debts to the extent to which he is held to have been a pecuniary gainer. (Smith v. Drummond, July 2, 1829.)

70. Where the wife has conveyed her whole property, heritable and moveable, to the husband, he is liable for all her debts, even after the dissolution of the marriage. (Ersk. i. 6. 18.)

71. The wife's heirs are liable before the husband, even where he is *lucratus* by the marriage. (Ersk. i. 6. 17.)

72. There are certain cases in which, even during marriage, the wife is able to contract so as to bind the husband. This exception to the general rule proceeds on the principle, that in these cases she acted as his agent.

73. The wife is presumed by the law to be set over the

domestic affairs of the family, and entrusted with their management (*præposita negotiis domesticis*); and consequently the husband is held to have consented to all contracts that are entered into by her in that capacity.

74. In this respect, however, the position of the wife is not peculiar, as the same rule holds with reference to a daughter or any other recognised housekeeper. (Stair, i. tit. 4, Brodie's note, p. 31; Fraser, 605.)

75. It is only for *necessaries* that the husband is thus liable; but this word will be so construed as to include whatever is suitable for a family in the station of life occupied by the husband. Nor is it confined to the furnishings of the family, but is held to include all expenditure on the part of the wife which is absolutely indispensable, from whatever cause. (Fraser, 607.) On this ground, a husband has been held liable for the expenses incurred to an agent for carrying on an action of declarator of marriage, in which he himself was defender (*M'Alister v. Husband*, Mor. 4036), for defending her in an action of divorce in which she was unsuccessful (*Gray v. Mickle*, Mar. 10, 1803), and in an action of separation and aliment at her instance afterwards abandoned. (Clark, 1875, 2 R. 428.) But such will not be the case if the proceedings have had reference to her own estate.\* (*Macara v. Wilson*, Feb. 15, 1848.)

76. A tradesman dealing with a married woman is bound to exercise a sound discretion as to the character of the goods furnished to her, as her husband will not be bound if they altogether exceed, either in quantity or quality, the reasonable

\* It is thought that, on principle, the husband's liability for the expenses incurred by the wife in actions referring to the marriage does not rest on the ground of her institorial power, or of such expenses being necessaries, but rather that they are proper charges on the goods in communion, which during the marriage are under the absolute control of the husband.

requirements of a person in her condition. (Ersk. i. 6. 26 and 19.)

77. If it is in his power to return the goods, and he omit to do so, he will be liable; and it will be no answer to say that the wife is disobedient, as it is his duty to exercise his marital rights. (Ersk. *ut sup.*)

78. The presumption that the debt was incurred with the husband's authority, will be repelled by evidence showing that the credit of the wife was alone relied on by the tradesman. (Binny v. Smith, Jan. 26, 1836.)

79. The husband will be liable for articles of dress or ornament which the wife has worn in his presence without his objecting. (Fraser, 608, and English cases cited.)

80. The husband's liability will not be removed by having given money to the wife for the purpose of paying a debt, if she has not applied it to that purpose. (Ersk. i. 6. 26.)

81. The wife cannot borrow money in her capacity of domestic manager; and in order to render the husband liable, it must be shown that it has been actually expended either for his benefit or for the aliment of the wife. (Fraser, 618.)

82. If the husband has acknowledged the debt by asking indulgence from the creditor, or by paying interest, he will be liable. (Grant v. Baillie, Feb. 26, 1830.)

83. The wife cannot sell or pledge money or furniture belonging to the husband. (Bell's Prin. 1557; Nairn v. Buchanan, M. 1669 and 6016.)

84. She is entitled to hire domestic servants without his authority. This point does not appear to have been determined in Scotland, but it has been so fixed in England. (Fraser, 619.)

85. The separate estate of the wife is not liable for alimentary or necessary debts which she has incurred for the family, even if the husband should be bankrupt. (Ersk. i. 6. 26; Sandilands v. Mercer, May 30, 1833.)

86. In addition to the cases in which the law presumes the consent of the husband from the mere fact of the marriage, there are others in which it will be presumed from special circumstances. In these the wife holds to the husband the position of a mandatory. The question, what circumstances will suffice to raise up this presumption, belongs to the law of evidence; and the answer to it depends so much upon the specialties of each particular case, as scarcely to admit of being given in general terms. (Dickson on Evidence, i. 313, and cases referred to.)

87. If for a length of time the husband has fulfilled the wife's engagements, his consent will be presumed. It is generally in the case of their carrying on some sort of joint trade, such as keeping an inn, that she is held to bind him in business transactions. (Ersk. i. 6. 26; Fraser, 623; Buchanan v. Dickie, June 17, 1828; Wood v. Downie, June 15, 1857.)

88. It is said that the wife may be specially constituted commissioner to the husband; and in that capacity may manage his heritable estate, grant leases, burthen his property with debt, enter vassals, and even sell. Further, that she may be appointed his factor or agent, and as such may grant bills for him, and enter into contracts as an ordinary agent; the husband in such cases being liable in damages for the wrongous acts of the wife. (Fraser, 625.) [It has been held, for example, that, where a wife trades in her own name with funds belonging to her husband, with his consent, he, and not she, is bound. (Carmichael, 1879, 7 R. 118.)]

89. But, in general, no act by a wife during her husband's lifetime is excepted from his curatory; and where his consent is attainable, it ought always to be procured, especially in any transaction having reference to heritage.

90. A wife cannot enter into a contract of copartnership with her husband to carry on a trade with him, though possessed of funds independent of him. (Macara v. Wilson, Feb. 15, 1848.)

VI. HOW THE HUSBAND CEASES TO BE LIABLE FOR THE  
WIFE'S DEBTS.

91. *Inhibition* is a species of legal notification to which the husband must resort, in order to free himself from liability for his wife's acts in those cases in which his consent is presumed by the law. It is in his power to resort to this expedient whenever he wishes to depose his wife from the office of domestic manager which the marriage has conferred; and he may use it according to his pleasure or caprice, with reason or against reason. The object of conferring this arbitrary power on the husband, is to prevent the necessity of exposing domestic quarrels to the judgment of a court or a jury. (Stair, i. 4. 15 and 17; Ersk. i. 6. 26; Bell's Prin. 1566; Fraser, 629.)

92. The inhibition is in the form of a judicial prohibition, addressed to the wife, forbidding her to dispose of her husband's effects, or contract debts, and to the lieges in general, forbidding them to buy his goods from her, or give her credit. (Jurid. Styles, 2nd ed. vol. iii. p. 540.)

93. The inhibition must be executed both against the wife and the public. The *first* is effected by a messenger-at-arms serving a short copy on her at her residence; the *second*, by publication at the head burgh of the shire where the husband resides, and by registration either in the particular register of the shire, or in the general register of inhibitions at Edinburgh. (Fraser, 631.) By the Court of Session Act, 1868, sec. 18, the Land Registers Act, 1868, sec. 16, and the Titles to Land Consolidation Act, 1868, sec. 155, considerable changes have been made in the law in regard to inhibitions. It is enacted that publication at the head burgh is no longer necessary, though still competent. It is thought that, from the terms of these enactments, an inhibition against a wife is included in them; but, apart from any practice or decision to the contrary, the prudent course is to execute these writs according to the older forms.

94. No particular intimation of the inhibition to the merchants with whom the wife was in the habit of dealing is necessary; and it will be operative against them even should they be ignorant of its existence. The effect will be the same though the merchants be resident abroad, it having been decided that the "diligence, being regular according to the law of Scotland, must be effectual against all mankind." (*Topham v. Marshall*; M. App. v. Inhibition, No. 2.)

95. The only exception to the validity of an inhibition is where the husband fails to provide the wife with a sufficient maintenance. In that case she may contract in so far as is necessary for her own subsistence. (*Gordon v. Sempill*, M. App. Husband and Wife, 4.)

96. Even after inhibition, the wife may contract with her husband's consent; and this consent may be inferred from his knowing and approving of her transactions. (*Kerr v. Gibson*, M. 6023.)

97. Private notice to a tradesman, in so far as the particular instance is concerned, is equally effectual with inhibition. (*Buie v. Gordon*, Feb. 23, 1827.)

98. Where the husband and wife have separated, either by mutual consent or in consequence of maltreatment by the husband, the law will no longer *presume* that the wife has his authority for incurring debts for domestic purposes. The only grounds on which a tradesman will be entitled to recover from the husband, in such circumstances, will be that the debts were incurred for the wife's personal maintenance. (*Ersk. i. 6. 19, 25, 26*; *Fraser*, 635, 638.)

99. Where a husband has turned his wife out of doors without justifiable cause, he cannot exempt himself from the obligation to maintain her by an advertisement in a newspaper cautioning the public not to trust her; nor, beyond the particular instance by notice to individuals not to give her credit. (*Ib.* 641.) Where, however, he has turned her out for adultery, he is only

bound to aliment her on an order from Court to that effect, and a tradesman's account for furnishings supplied to her thereafter could not be recovered from the husband; "her adultery having destroyed her implied agency to bind her husband by her contracts for necessaries." (Ib. 645.)

100. But where the wife, without sufficient cause, leaves the husband, he is not bound to furnish her with a separate aliment, nor will he be liable for the debts which she contracts for that purpose. (Ib. 641.)

101. Where a wife went to London without her husband's consent, it was found that he was not liable even for her necessary furnishings whilst there; but the case is an old one. (*Countess of Caithness v. The Earl*, M. 5886; Fraser, 642.)

102. In order that the husband's liability for aliment may continue, the wife must assign such a cause for leaving him as a court or a jury can entertain, and not such as has its existence only in the mind of a fanciful and capricious woman. (*Connal v. Connal*, June 18, 1833.)

103. Adultery on the part of the husband, or the introduction of a prostitute into his house, will be sufficient. (*Horwood v. Heffer*, 3 Taunt. 421.)

104. If no inhibition has been used, and no notice given to the tradesman, the onus of showing that he knew of the separation will lie on the husband.

105. It has been held in England, that if the tradesman was aware of the fact of separation, he must accept the onus of showing that it took place in such circumstances as not to free the husband from liability. (Fraser, 643.)

106. If during her desertion the wife become insane, the husband is bound to maintain her, because from that moment she no longer has the will to violate the duty of conjugal adherence; and she is held no longer to do so. (*Scott v. Selbie*, Jan. 20, 1835.)

107. Where the husband has made a suitable allowance for a

separate establishment to the wife, tradesmen who deal with her must rely on this allowance alone; and no intimation will be required to free the husband from liability. (Stair, i. 4. 16; Ersk. i. 6. 25.)

#### VII. OF THE COMMUNITY OF GOODS.

108. The *community of goods* amongst the Teutonic races, to whom its origin has been traced, was an actual partnership between the spouses, bringing along with it equal rights both to the property and management of the common fund. On being adopted by the customary law of France, the doctrine of the *communio* underwent an entire change. The husband became "lord of the moveables and conquest heritage," and the wife's right resolved itself into a claim to a certain portion of them (a half or a third) after his death. The name, no longer retaining its original signification, continued to hold its ground in France, and was imported into Scotland towards the end of the reign of Charles II. by the lawyers, who were then almost invariably educated in France. But the arrangement regarding the moveable property of the spouses which had formerly prevailed in Scotland, being not very dissimilar to that which had grown up in France, underwent no very serious alteration; and the doctrine of the community of goods, though supported by the high authority of Lord Stair, never was accepted in Scotland to the extent of establishing an equality of rights between the parties, or extensively affecting the marital powers of the husband.\*

109. The true doctrine of the law of Scotland, and that which has since been followed in the courts, was laid down in 1842. "The absolute power of use and disposal being in the husband,"

\* This interesting speculation, the soundness of which has not been universally admitted, will be found at full length in Fraser, H. and W. 649 *et seq.*

said the consulted judges, "we must consider the goods, *nominally* in communion, as truly his, not at all the wife's property." (*Shearer v. Christie*, Nov. 18, 1842.)

110. In accordance with this view, it has been further decided (*Fisher v. Dickson*, June 16, 1840 ; affirmed April 6, 1843) that the claim of a wife on the estate of the husband, after his death, is not a claim to the division of a common fund, but simply a right of debt by which the wife becomes a creditor of the husband's executors. The same doctrine has been applied to the claim of the children for *legitim*, hereafter to be mentioned.

111. In apparent consistency with the doctrine of a community of property, the husband, till the passing of the recent Movable Succession Act, was bound, in the event of the wife predeceasing him, instantly to account to her heirs for her half of the goods. By that Act (18 Vict. c. 23), in accordance with what we have seen to be the true principle of the husband's proprietary, it is provided (sec. 6) that, "where a wife shall predecease her husband, the next of kin, executors, or other representatives of such wife, whether testate or intestate, shall have no right to any share of the goods in communion, nor shall any legacy, or bequest, or testamentary disposition thereof, by such wife, affect or attach to the said goods, or any portion thereof."

112. Another provision which was borrowed by our law from that of France was to the effect that, if the marriage was dissolved within a year and day, without a living child, all that either spouse had received from the other must be returned. By the 7th section of the Act to which we have just referred, the distinction between this case and the case of a marriage which has endured for a longer period is removed.

113. The proprietary powers of the husband are confined to the moveable estate of the wife: whatever the law of Scotland holds to be heritable, remains the property of the wife. (*Stair*, i. 4. 9; *Ersk.* i. 6. 12.)

114. The distinction between heritable and moveable, or, in English phraseology, between real and personal, property being in general (see *Jus Relictæ*) the same when applied to the rights of husband and wife as of heir and executor, will be considered under Succession.

VIII. HOW THE HUSBAND'S POWER IS EXCLUDED.

115. The conjugal power of the husband may be excluded either by the nature of the subject, by implication from the position of the other parties, by express arrangement, or under the statutory provisions of 24 and 25 Vict. c. 86.

116. A provision for the support and aliment of the wife, whether proceeding from a third party or from the husband himself, is removed beyond his control. (*M'Gregor's Trustees v. M'Gregor*, Jan. 22, 1820.) He cannot demand it when due by a third party, and his discharge would not be a sufficient discharge to a debtor, though, as matter of prudence, the third party should always require the husband's concurrence to the wife's discharge.

117. The wife cannot assign even an alimentary fund from which the husband's whole rights are carefully excluded, excepting perhaps in virtue of the Act 24 and 25 Vict. c. 80. A decision to this effect was pronounced, where the *jus mariti* was not only excluded from the fund in question, but where the husband was absent from Scotland, and where the assignation was granted in security of money advanced to him at the wife's request, to enable him to retrieve his affairs. (*Rennie v. Ritchie*, April 25, 1845, 4 Bell, H. of L. 221.)

118. If the alimentary provision be greatly in excess of the requirements of a person in the social position occupied by the wife, it will, to the extent to which it is in excess, be attachable by the husband's creditors. (*Fraser*, 765.)

119. If the alimentary provision has proceeded from a third

party, by whom the power of the husband has been expressly excluded, it will not be attachable, however large, either by the husband or his creditors. (Ib.)

120. The *paraphernalia* of the wife, i.e. her dress, jewels, and other strictly personal possessions, do not fall under the *ius mariti* of the husband, and cannot be attached by his creditors. (Ersk. i. 6. 15 and 27; Stair, i. 4. 17; Bell, Prin. 1555; Fraser, 805.) They remain, however, subject to his right of administration, and she cannot give away or impignorate them without his consent.

121. Articles of furniture, though belonging to the department of the domestic economy over which the wife may be supposed to preside more exclusively, such as tea-plate and linen, even though given to her before marriage and marked with her initials, are not paraphernal. (*Black v. Wood*, Hume, p. 210.) A chest of drawers, on the other hand, in which the dress and ornaments of the wife were kept, was found to be paraphernal. (*Pitcairn v. Peutherer*, M. 5825.)

122. The character of paraphernalia may be communicated to articles not falling strictly under the above category, by being given by the husband to the wife, previous to marriage, on this express understanding. (Ersk. i. 6. 15 and 29.)

123. These articles would lose this character by his death, and might be attached by the creditors of a second husband. On the death of the wife, her paraphernalia descend to her own executors, in preference to her husband or his representatives. (Ersk. i. 6. 15.)

124. The wife may exercise *over her heritable property*, with the husband's consent, all the acts of administration competent to any other proprietor. She may sell, alienate, burden, or grant it in lease. She may also borrow money, and grant an heritable bond over it. But it is the husband alone who can uplift the rents and profits of the wife's estate, in all cases in which his marital powers are not expressly excluded or re-

nounced. (Bell, Prin. 1594.) As the property, however, tinues in the wife, he cannot alienate it or burden it with so as to affect it after his own decease, nor can he grant feu. (Kennedy v. Watson, Nov. 29, 1848.) He may gra lease to last during his own life, but not longer. (Grieve, 15, 1797, M. 5951.)

125. In treating of the powers of the husband, it is neces to remark that a distinction exists between the *jus mariti* the right of administration, as the former may be excl where the latter remains. (Fraser, 796.) In this case, fruits and annual returns from the property belong to the and the application of them must be according to her direct but she will not be able to sue for them without her husb concurrence, or even perform the ordinary acts of admini tion, such as granting leases and removing tenants, withou consent. The exclusion of the *jus mariti* will, however, pr the property effectually against the diligence of the husb creditors. (Dick v. Pinkhill, M. 5999.) The *jus mari* simply the husband's absolute right to the whole move property of his wife, including the rents of her heritage.

126. Where both the *jus mariti* and right of administra are excluded, the wife becomes the independent manager of the property thus possessed by her. (Keggie v. Christie, 25, 1815; Gowan v. Pursell, May 17, 1822; and 24 and Vict. c. 86.) [And it has been decided that a wife, in circumstances, may invest funds in trade and incur pers obligations which will be effectual against her separate es but not against her husband (Biggart, 1879, 6 R. 470; For ib. 1122; Wright, 1880, 7 R. 527); and also that she may her husband's creditor, and may rank on his sequestrated es for advances which she may have made to him. (Laidlaw, 11 10 R. 374.)] But it would be very unsafe to take a convey of heritage from a woman except in virtue of the powers ferred on her by 24 and 25 Vict. c. 86, as explained ab

2, 54 (9), without her husband's consent as her curator.  
 . 9; Ersk. i. 6. 14; Bell, Prin. 1562.)

ll the passing of the statute just referred to (24 and  
 286), the marital powers of the husband were not  
 7 voluntary separation, or by the absence of the hus-  
 Scotland; and it was doubted whether even judicial  
 would entitle the wife to alienate or burden her  
 or to exceed the limits of ordinary administration and  
 nt. (*Baillie v. Letham*, Elch. Annot. p. 12.)

Where the husband," says Mr. Erskine, "is, from  
 r other disability, rendered incapable of interposing  
 t as curator, the necessity of the case may support a  
 ed by the wife alone, affecting her heritage, if it be  
 (Ersk. i. 27.)

order to protect a deed by a married woman from  
 on the ground that it was executed under the influ-  
 a force or fear of the husband, it must be ratified by  
 nitted by her, in his absence, before a judge. This  
 nerally performed by a justice of the peace at his  
 nce. (*Ante*, secs. 50, 51.) The ratification, whether  
 n a separate paper duly stamped, or indorsed on the  
 be subscribed by the wife, or by two notaries when  
 ; write. The attestation of the justice will not be  
 (*Gartshore v. Brand*, M. 6076.)

here any doubt occurs as to the necessity of ratifica-  
 after course is to observe the ceremony, and the Court  
 imes authorize it, *ob majorem cautelam*. (*Brisbane*,  
 850.)

is ratification does not bar the wife from challenging  
 n any other plea than force or fear, such as fraud  
 umming, June 28, 1706, M. 16,507); neither is the  
 hat the force or fear proceeded from third parties  
 (Ersk. i. 6. 35.) See the converse case of *Buchan v.*  
 1, 1834, mentioned sec. 51, p. 16.

132. When the wife raises an action of separation or divorce, she will be entitled to a separate aliment from her husband during its discussion, and a sum for this purpose will be awarded by the Lord Ordinary. (*Borthwick v. Borthwick*, June 17, 1848.)

133. She will have no such claim, however, if she has a separate estate sufficient for her maintenance (*Macfarlane v. Macfarlane*, June 26, 1844); and, in any case, it is in the discretion of the Court to give or withhold the aliment, and to fix its amount according to the circumstances of each particular case.

134. [*Married Women's Property Act* (1881).—This Act (44 and 45 Vict. c. 21) has made a revolution in this branch of the law, amounting, as far as regards marriages contracted after its passing (18th July 1881), or property coming to a married woman who has been married previously (except where such property has been disposed of by antenuptial marriage contract), to the abolition totally of the *jus mariti*, and partially of the right of administration.

135. [This statute, which proceeds on the preamble of the justice and expediency of extending the provisions of the Act of 1877 (*supra*, p. 14), enacts :—

136. [In the case of marriages contracted after the passing of the Act, if the husband was at the time of the marriage domiciled in Scotland, the whole moveable estate of the wife, whether acquired before or during the marriage, is vested in her by operation of law, and is not subject to the *jus mariti*. The income from it is payable to her on her own individual receipt or order, but she cannot assign the prospective income or dispose of the estate without her husband's consent. (See Poë, *infra*, sec. 140.) When her moveable estate is "invested, placed or secured" in her own name, or in such terms as to be clearly distinguished from that of her husband, it is not to be arrestable for his debts. In the event of the husband's bankruptcy,

where any money of the wife's has been lent or entrusted to him, or become immixed with his funds, the wife ranks as a creditor after the claims of creditors for valuable consideration. The right to make private arrangement by antenuptial marriage contract remains untouched by these provisions. (Sec. 1.)

137. [The rents of the wife's heritable property in Scotland are no longer subject to the *jus mariti* or the right of administration of the husband. (Sec. 2.)

138. [The Act does not apply to marriages contracted before its passing—(1) where the husband shall have before that time, by irrevocable deed, made a reasonable provision for his wife in the event of her surviving him; and (2) only to the effect that the *jus mariti* and right of administration are excluded, to the extent previously prescribed, from all estate, heritable or moveable, and income thereof, to which the wife may acquire right after the passing of the Act. (Sec. 3.)

139. [Persons married before the Act may place themselves under its provisions by voluntary mutual deed, which shall not, however, have any effect as against any debt of the husband incurred prior to its execution. (Sec. 4.)

140. [Where a wife is deserted by, or living in voluntary separation from her husband, the Court of Session, or Sheriff Court, may dispense with her husband's consent to any deed relating to her estate to which it would otherwise be required. (Sec. 5.) This section is to be held as applicable to marriages contracted before as well as to those contracted after the passing of the Act. (Poë, Dec. 13, 1882, 10 R. 356; aff. July 16, 1883, ib. H. L. 73.)

141. [The Act specially exempts from its operation "any contracts made or to be made between married persons before or during marriage, or the law relating to such contracts, or the law relating to donations between married persons, or to a wife's non-liability to diligence against her person, or any of the rights of married women" under the Act of 1877. (Sec. 8; Birnie's Married Women's Property Act.)

142. [By 43 and 44 Vict. c. 26, which extends to Scotland certain provisions of the English Married Women's Property Act of 1870, a married woman may effect a policy of assurance on her own life or her husband's for her separate use, exclusive of his *jus mariti* and right of administration, and which she may assign *inter vivos* or *mortis causa* without his consent. A husband may likewise effect a policy on his own life in trust for his wife and children, which shall then be beyond his control, form no part of his estate, and be exempt from the diligence of his creditors, and not be revocable as a donation, unless it be shown to have been effected with intent to defraud his creditors, or within two years of his becoming bankrupt.]

#### IX. SEPARATION—JUDICIAL AND VOLUNTARY.

143. The law considers conjugal adherence to be one of the most sacred duties arising from the married state; and, as a general rule, it may be stated that the only case in which a judicial separation will be granted by a court of law in Scotland, is that in which this duty can no longer be performed without danger either to life or character.

144. All the grounds for separation may thus be reduced to the two heads of *cruelty* and *adultery*.

145. Personal violence endangering life, reasonable apprehension of such violence, or anything analogous to personal violence, such as starving a wife, exposing her, injuring her health by continued unkindness, or the like, will be sufficient to authorize judicial separation. (*Evans v. Evans*, 1 Haggard 69; *Paterson v. Russell*, H. of L., 9th August 1850; *Bell's App.* vii. p. 337.)

146. Threatening words must be of such a character as to show a settled purpose of acting on them, not mere expressions of passing anger.

147. A false imputation of lasciviousness, made by the husband against the wife publicly and perseveringly, was held

by the Commissaries and the Court of Session to be a sufficient ground for judicial separation; but this decision the House of Lords reversed, after a three days' hearing.—*Leckie v. Moir*; *Elch. Husband and Wife*, No. 35 (1750). The correctness of this decision, however, has been called in question by *obiter dicta* from the bench; and opinions have been indicated that a course of harsh and contumelious usage is *conceivable*, which, though unaccompanied by threatenings of personal violence, would be sufficient to warrant separation. On this point, the observations of Lord Brougham, in *Paterson v. Russell* (*sup.*), are very important: "If the husband, without any violence, or threat of violence, to his wife, without any maltreatment endangering life or health, were to exercise mere tyranny, constant insult, vituperation, scornful language, charges of gross offences, utterly groundless; charges of this kind made before her family, her children, her relations, her friends, her servants; insulting her in the face of the world, and of her own domestics; calling upon them to join in these insults, and to treat her with contumely and with scorn: if such a case were to be made out, or even short of such a case, any injurious treatment which would make the marriage state impossible to be endured, rendering life itself almost unbearable, then, I think, the probability is very high, that the Consistorial Courts of this country would relax the rigour of their negative rule." But see *Fraser*, 894. [It has been more recently observed that the issue in an action of separation is, whether the wife has such reasonable ground for apprehension of violence as to make it advisable that she should not be forced to go back to her husband. (*Graham*, 1878, 5 R. 1093.)]

148. It is thus apparent that no ordinary austerity of temper, petulance of manner, rudeness of language, or even occasional passion, will be held as amounting to cruelty. Still less will the denial, however unreasonable, of indulgences, luxuries, and accommodations, be held as such; for "the Court has no scale

of sensibilities by which it can gauge the quantum of injury done and felt." (Evans v. Evans, 1 Hagg. p. 38.)

149. Habitual intoxication on the husband's part, not accompanied by personal violence, will not be sufficient; but turning the wife out of doors amounts to cruelty, and opens to her the remedy of judicial separation. [Habitual intoxication, however coupled with violent conduct, such as to induce a reasonable fear of personal injury, has recently been held enough to entitle a wife to separation. (M'Gaan, 1880, 8 R. 279.)]

150. The husband is entitled to forbid the wife's friends from visiting her; and he may confine her to the house, or at least direct her movements so as to prevent her from going to places and engaging in pursuits of which he disapproves. Though such prohibitions, in ordinary circumstances, would unquestionably amount to a harsh exercise of the marital authority, they may be caused to justify them, of the reasonableness of which the court cannot, and ought not, to judge. (Fraser, 896.)

151. Crimes of an aggravated nature on the part of the husband, as being productive of personal danger to the wife both physical and moral, are just causes of awarding her the remedy of separation. (Brown, ii. 29. 10.)

152. The fact of either spouse having become diseased, however loathsome may be the character of the affection, will not have this effect, except in the single case where the disease is of such a character as of itself to afford *prima facie* evidence of adultery. (Fraser, 890; Popkins v. Popkins, 1 Hagg. 765.)

153. Neither venereal disease, if contracted before marriage, nor impotency supervening from the effects of incontinence before marriage, nor the taint of hereditary madness, if undeveloped, will be adequate grounds for separation. (Fraser, 891.) Even confirmed insanity, if supervening on marriage, is no ground for declaring it null; though the sane spouse would of course be entitled to resort to separation, if necessary for personal safety. This, however, must be done by the authority

of a magistrate. (*Belcher v. Belcher*, Phillimore's Report, June 6, 1835. See Insanity.)

154. In actions of separation on the ground of cruelty, a renewal of intercourse after the acts alleged will not be held a *remissio injuriarum*, like the renewal of intercourse after knowledge of adultery in cases of divorce. (*Macfarlane v. Macfarlane*, Feb. 7, 1849.) [For the distinction between the plea of remission or condonation in defence to an action of separation for maltreatment and to one of divorce for adultery, see *Graham*, 1878, 5 R. 1093.]

155. Adultery is a ground for separation, which may be chosen in preference to divorce, at the option of the injured party. (*Letham v. Provan*, March 8, 1823.)

156. Judicial separation is competent to both spouses; though, where cruelty is the ground on which it is sought by the husband, the facts must be somewhat different from those which would be sufficient to entitle the wife to the remedy. (*Kirkman v. Kirkman*, 1 Hagg. 409.)

157. It has been held incompetent to pronounce judgment in an action of separation in favour of the pursuer, merely upon the admissions of the defender. (*Muirhead v. Muirhead*, May 28, 1846; and 1 Will. iv. c. 69, sec. 36.)

158. Judicial separation annihilates the marital power over the wife's *person*. She may go where she chooses; and consequently the rule of law, that the husband's domicile is hers, no longer holds; and she must be cited as if she were unmarried. (*Ensk. i. 6. 21*; *Fraser*, 906; *Alison v. Catley*, June 15, 1839.)

159. Except as regards the wife's separate aliment, and the property which she may hold independently of her husband, under the provisions of the Conjugal Rights Act (24 and 25 Vict. c. 86), judicial separation makes no change on the matrimonial relations of the spouses. (*Alison v. Catley*, June 15, 1839; *Ferg. Cons. Law*, p. 183.)

160. The custody of the children will be regulated by the

Court, in the exercise of a sound discretion, and they will pronounce an order for custody though there be no conclusion to that effect in the summons. (Symington, 1874 ; 1 Rettie, 871.) Where the husband commits the wrong, they will, in the general case, be given to the wife till the girls be twelve and the boys seven years of age. (Lindsay, March 6, 1860 ; Fraser, 908.)

161. The separation may be recalled by the same Court which granted it, on proof of the fact that the cause for which it was granted no longer exists. (Ib. 907.)

162. It may also be recalled by mutual consent, which may be either express or implied. Thus, where a wife, having obtained a decree of separation, returned to the society of her husband before an aliment was modified to her, and lived with him for four years, it was found that a remission of the decree by implication had taken place. (Winton v. Grieve, May 15, 1830.)

163. *Laoburrows* is a remedy of which those spouses may avail themselves who are unwilling to proceed to so extreme a measure as separation, and who, notwithstanding, feel that they stand in need of the protection of the law. (Fraser, 910.)

164. There is this difference between this remedy as applied to husbands and wives, and to parties unconnected with each other, that whereas in the latter case it is enough if the party injured swear that he dreads bodily harm, in the former the petition must be served on the wrong-doer, and its whole averments supported by proof, before the prayer of the petition will be granted. (Taylor v. Taylor, June 25, 1829.)

165. *Voluntary separation* is the remedy adopted where the spouses live unhappily together, but where neither has acted towards the other in such a manner as to warrant judicial separation, or where, though such has been the case, they are unwilling to expose their failings in a court of law. (Ersk. i. 6. 30 ; Fraser, 911.)

166. By our ancient law, a contract of voluntary separation was regarded as null, on the ground that, being inconsistent with the duty of adherence incumbent on married pairs, it was *contra bonos mores*. This doctrine is still adhered to, to the extent of not enforcing such contracts with regard to future time, though they will be held as having regulated the rights of parties as regards the past.

167. The contract of separation narrates the intention of the parties to live separately, and sets forth the causes of separation. This latter is a point on which the injured party should carefully insist, so as to facilitate his obtaining a judicial separation should the voluntary contract be revoked. Either party may revoke the deed during marriage. (Ib. 912.)

#### X. DONATIONS BETWEEN HUSBAND AND WIFE.

168. By our law, donations between husband and wife are allowed ; but they are revocable at the instance of the donor, or the creditors of the donor, at any time during the subsistence of the marriage. The object of this rule, which in a modified form we borrowed from the Roman law at a very early period, is to prevent the spouses from despoiling themselves or their heirs from mutual affection. (Reg. Maj. lib. ii. c. 15, secs. 10, 11 ; Dig. lib. xxiv. tit. 1, sec. 1 ; Stair, i. 4. 18 ; Ersk. B. i. tit. vi. sec. 29 ; Kidd v. Kidds, December 10, 1863 ; 2 M. 227.)

169. Though the bride has no power to execute deeds in favour of third parties, to the bridegroom's prejudice, donations between bride and bridegroom are irrevocable. (Fraser, i. 347 and 473.) Of such gifts Lord Fountainhall said, not without apparent reason, that " bonds granted *inter sponsum et sponsam* in *actu amoris* are more to be reputed donations, and more exorbitant than what are given after marriage, there being a greater eclipse of the use of reason at that time than afterwards."

But the contrary has long been settled law. (Stair, i. 4. 18; Ersk. i. 6. 29; Fraser, 917.)

170. After the marriage is dissolved by divorce, there is no impediment to grants by either party to the other, and such donations would be irrevocable. (Dig. xxiv. 1. 35 and 64; Fraser, ib. ; Murray v. Livingstone, Moo. 328.) But previous donations are held to be revoked by the divorce of the donee for adultery. (Ersk. i. 6. 31; Fraser, 952.)

171. If a deed between husband and wife do not contain the recital of an onerous cause of granting, it is presumed to be a donation. (Bell's Prin. 1616.) This presumption, however, may be redargued by contrary proof, and its only effect is in fixing the burden of proof upon the party against whom it bears. (Fraser, 925.) Should it appear that a provision and not a donation was truly intended, the provision should be allowed to stand, being liable to be reduced only *quoad excessum*. In a question between the donee and the donor's creditors, however, a provision to the wife could scarcely be allowed to take effect during the subsistence of the marriage, since the husband is bound by law to support her. (Dunlop, 1867, 5 M. H. L. 22.)

172. The renunciation of the *jus mariti* without onerous cause is a donation which the husband will be entitled to revoke. (Fraser, 932.)

173. A donation will be tacitly revoked by the donor doing anything which is plainly inconsistent with its continuance in the hands of the donee; but revocation will not be inferred from a voluntary, or even a judicial separation, between the spouses. (Ib. 951.) Revocation is barred by divorce for adultery. (Bell's Prin. 1619.)

174. The predecease of the donee does not effect a revocation of the gift, which passes to his heir; but no length of enjoyment by the heir will, in the case of heritage, deprive the donor of his right of revocation. (Fraser, 952.) A third party

acquiring from the donee by a singular and onerous title, would be protected from revocation.

175. A general conveyance of property does not infer a tacit revocation. (Ib. 953.) Ratification by the wife does not render a donation by her to the husband irrevocable. (Ersk. i. 6. 35 ; Bell's Prin. 1619.)

#### XI. DISSOLUTION OF MARRIAGE.

176. Marriage is dissolved in two ways: by *death*, and by *divorce*.

##### 1. *Death*.

177. Where the marriage is dissolved by the death of either of the spouses, the other is at liberty to marry again immediately, there being no "year of grief" imposed on the widow by the law of Scotland, as there was by the law of Rome. (Dig. iii. 2. 1 ; Code 5. 9. 1 and 3 ; Lord Mackenzie, in *M'Grigor v. M'Grigor's Trustees*, March 2, 1839, F. C.)

178. If the widow is pregnant, or affects to be so, in circumstances such as to give rise to a reasonable suspicion that a supposititious heir is about to be palmed off as the issue of the deceased husband, it is said that a medical examination will be ordered on application to the Court of Session. (*Ross v. Gray*, M. 16,455 (1699) ; and other authorities cited by Fraser, Parent and Child, 2.)

179. The widow is entitled to aliment from the husband's representatives till the first term of Martinmas or Whitsunday after his death. The principle of this rule is, that the law holds the husband's domestic establishment not to be broken up till the term following his death, and the wife receives aliment on what may be regarded as a fiction of his continued existence.

180. The widow's mournings are included in the provision to

which she is thus entitled; and being part of her husband's funeral expenses, they are preferable even to the debts of creditors. (*Sheddán v. Gibson*, May 15, 1802.)

181. The claim for aliment on the part of the widow does not possess a preference over the claims of the husband's creditors, and cannot compete with them. (*Bell's Com.* 634; *Fraser, H and W.* 966; *Buchanan v. Ferrier*, Feb. 14, 1822.)

182. It will not be invalidated by the fact that the wife possesses separate property of her own. (*Ib.*)

183. It was till recently the rule in Scotland, that if the marriage were dissolved within year and day, without the birth of a living child, it should not be regarded as a completed contract, and that the parties should stand, as regarded their interests in each other's estates, on the same footing in all respects as if no marriage had ever taken place. We have already mentioned (*ante*, sec. 112), that, in so far as moveable property is concerned, this rule has been altered by a recent statute. Though the subject is not free from doubt, there seems reason to believe that the 7th section of the statute referred to (18 and 19 Vict. c. 23) is general in its application, and consequently that the old law is altered as to heritage also. (*Fraser*, 1083.)

184. The surviving spouse is entitled to certain provisions both from the heritable and moveable property of the predeceaser.

185. *Terce* is a liferent accruing to the widow in one-third of the heritage in which the husband died infest as of fee, not merely nominally or in trust. (*Ersk. ii.* 9. 44; *Reg. Maj. lib. ii. c.* 16, sec. 5.) It corresponds to the English *dower*, and, like it, is of "reverend antiquity." (See the history of *terce* well given in *Fraser*, 1079. It originated in a Teutonic, not a Roman custom.)

186. If a special provision has been granted to the wife, either by ante-nuptial or post-nuptial settlement, or by any other

deed, the terce will be held to be tacitly excluded, unless the deed contains an express reservation of it. (Bell's Prin. 1597.)

187. Lesser terce is that which is due out of lands still burdened with terce to the widow of a former proprietor. It is therefore one-third of the remaining two-thirds. (Stair, ii. 6. 16; Ersk. ii. 9. 47; Reg. Maj. ii. 16. 64.) On the death of the former tercer, it extends to a complete third of the whole lands.

188. The terce is diminished by all real burdens completed by infestment before the husband's death. The mansion-house, unless let, or where there are more than one, has also been excluded by custom from the terce. (Bell's Prin. 1598; Fraser, 1097.)

189. Terce is said to be due where the death of the husband is merely civil, and also if the marriage is dissolved by divorce either for adultery or desertion by the husband. (Fraser, 1082.)

190. No terce is due from superiorities, mines and minerals, or patronages. (Ib. 1098 *et seq.*)

191. If the view of 18 and 19 Vict. c. 23, stated sec. 172, be correct, terce will be due to the widow under that statute, even though the marriage be dissolved within year and day, and without the birth of a living child.

192. *Courtesy*, or *the courtesy of Scotland* as it is called, though it exists in England, and is now traced to a Continental origin (see the Coutume of Normandy, quoted from Basnage, vol. ii. p. 60, by Fraser, 1118), is a liferent corresponding to the widow's terce, which accrues to the husband on the death of the wife, but differing from terce in this, that it extends to the *whole* of the heritable property in which she died infest.

193. The right to courtesy does not emerge unless a living child has been born of the marriage, however long it may have endured. This child must further be the mother's heir; so that, if there be a child by a former marriage who is the mother's

heir, courtesy will not be due to the second husband. (Ersk. ii. 9. 53.) Should this child die before he has made up his titles, and thereby vested his mother's estate in his person, courtesy will be due to the second husband, provided the second marriage has produced an heir. (Fraser, 1121.) It is thus rather as the father of an heir than as the widower of an heiress, that courtesy is due to the surviving husband. But it is not necessary that the child should survive. If it has once lived, and *been heard to cry* (Robertson v. Moderator of General Assembly, Jan. 22, 1833), that is sufficient to confer the right. (Ersk. ii. 9. 52 *et seq.* ; Bell's Prin. 1606.)

194. If the child was born before the marriage of the parents, but legitimated by their marriage subsequently, the husband will be entitled to courtesy, though the wife die immediately after marriage. (Fraser, *ut sup.*)

195. Courtesy extends to all heritage to which the wife succeeds, whether as heir of line, tailzie, or provision, and whether before the marriage or during its subsistence. (Ib. 1122.)

196. It does not extend to heritage acquired by purchase, donation, or other singular title, *i.e.* to what in Scotland is called conquest. (Ersk. ii. 9. 54 ; Hailes, p. 878.)

197. As the wife's representative, the husband, whilst possessed of the liferent of her heritage, is liable for all annual burdens affecting it, and also for the current interest of her personal debts, at least in so far as he is enriched by the courtesy. For such personal debts as he may thus pay he will have recourse against the wife's executors, or her heirs succeeding to property which does not fall under the courtesy. (Ersk. ii. 9. 55.)

198. Courtesy vests in the husband without service or any other legal form, while the widow's right to terce is vested only by service and kenning as tencer ; but though service be necessary to secure the widow's right as a *pro indiviso* proprietor, her preference, which depends upon her husband's infetment, is secured without this. (Bell's Prin. 1608.)

199. The claim to courtesy is barred by an express discharge by the husband (*Hamilton v. Boswal*, Rob. Appeals, p. 346); but, unlike terce, it is not tacitly excluded by a conventional provision not declared to be in lieu of it. (*Primrose v. Crawford*, M. App.; Fraser, 1125; Bell's Com. i. 632.)

200. *Jus relictæ* may be regarded either as the wife's share, or as a claim on the moveable property of the spouses emerging to her on the death of the husband. (As to the origin of the *jus relictæ*, and its relation to the *communio*, see Fraser, 671 *et seq.*)

201. If there be children of the husband, either by his last or by any former marriage, a tripartite division of the moveable property of the spouses takes place: one-third falls to the children as *legitim* (*legitima pars liberorum*); one-third, which is at the husband's disposal, and which, failing his destination, goes to his children as executors, is called "dead's part;" and the remaining third accrues to the widow as *jus relictæ*.

202. Where there are no children, the moveable property is divided into two equal parts, one of which is dead's part, and the other *jus relictæ*.

203. The wife's claim to *jus relictæ* will not be taken away by a conventional provision, unless it be expressly renounced. (Bell's Prin. 1581 and 1591.) It may be discharged gratuitously or onerously, in consequence of a provision having been accepted in lieu of it; and this is generally done by appropriate clauses in the marriage contract. A separate discharge may be given for it; or there may be a provision in the husband's settlement, that is to take effect only on the condition that the *jus relictæ* is to be held as discharged. The right is so strongly founded, that it will not be held as discharged by mere implication. (Fraser, 1060.) When a *mortis causa* deed disposes of the whole estate of the grantor, the widow cannot take provisions under it and at the same time claim her legal rights, but must make an election between the two. (Caithness's Trs., 1877, 4 R. 937.)

204. The husband cannot affect the *jus relictæ* by any testamentary or other deed (Bell's Prin. 1591), although he may diminish its amount indirectly during the marriage by his manner of administering the joint property of the spouses. (Ersk. iii. 9. 16.)

205. Personal bonds bearing interest, though moveable in most respects, are, after the term of payment has passed, heritable in regard to the *jus relictæ*. (Stat. 1661, c. 32.)

206. The *jus relictæ* does not entitle the wife to compete with the husband's creditors, or to rank on his bankrupt estate. (Fraser, 672 and 984.)

207. The *jus relictæ* not being regarded as a succession, vests in the wife without confirmation; and on this ground, as well as from its falling under the category of "legacies, annuities, and residues," bequeathed by one spouse to another, pays no legacy duty. (Ib. 1060; Bell's Dict., Directions by Solicitor of Legacy Duties.)

208. Though the wife should have children by a former marriage, the division will still be simply into two equal parts, they having already shared in the estate of their own father. Where the husband leaves children by a former marriage, on the other hand, it becomes tripartite.

209. The claim to *jus relictæ* is not now invalidated by the dissolution of the marriage within year and day. (18 Vict. c. 23.)

210. [ "By the Married Women's Property Act of 1881 (44 and 45 Vict. c. 21), it is now enacted that the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate, according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be." This section is not restricted to marriages contracted after the passing of the Act. Poë, 1882, 10 R. 356; aff. ib. H. L. 73.]

211. *Where the wife shall predecease the husband*, it is provided, by the statute just referred to, that "the next of kin, executors, or other representatives of such wife, whether testate or intestate, shall have no right to any share of the goods in communion, nor shall any legacy or bequest, or testamentary disposition thereof, by such wife, affect or attach to the said goods or any portion thereof." (Sec. 6.) The wife's power of testing, and the claims of her executors, should she die intestate, are thus confined to her separate estate.

212. But the principle of representation in moveable succession, introduced by this statute, does not apply to the *jus relictae*, its operation being restricted by the interpretation clause (sec. 9) to intestate succession to property of which the deceased might have disposed by will.

213. When a wife is separated from her husband, and an interlocutor of protection has been pronounced in her favour, in terms of the recent Conjugal Rights Act (24 and 25 Vict. c. 86, sec. 1), or where she has obtained a decree of separation *a mensa et toro*, all property which she may acquire, or which may come to devolve upon her, shall be held as property belonging to her, independent of the *jus mariti* and husband's power of administration, and such property may be disposed of by her in all respects as if she were unmarried; and on her decease the same shall, in case she shall die intestate, pass to her heirs and representatives, in like manner as if her husband had been then dead (sec. 6). And sec. 16 of the same Act provides that if the wife succeeds to property by donation, by bequest, or acquires it otherwise than by her own industry, the same shall not fall under the power of her husband or his creditors, until a suitable provision is made for the wife. But the wife's claim is postponed if a creditor has affected the fund by *complete* legal diligence prior to its being made.

214. *Legitim*, or the claim accruing to the children on the

moveable estate of the parents, will be considered under the head of Succession (*infra*).

## 2. Divorce.

215. There are two grounds only on which the law of Scotland will sanction the disruption of the matrimonial tie: adultery, and malicious desertion. (As to the history of the law of divorce in Scotland, see Fraser, H. and W. 1129 *et seq.*; and note to Brodie's Stair, B. i. tit. iv. p. 25 *et seq.*)

216. In thus limiting its interference to cases of absolute necessity, where it does little more than provide for the consequences of a fact which is already accomplished, our law seems to have struck a happy medium between the laxity which at one time disgraced the Christian world, and the over-stringent provisions of the Canon Law.

217. The Scottish law of divorce is, moreover, in accordance with that which prevails in almost all the Protestant countries of Europe, England being now scarcely excepted. "The conjugal relation," says Lord Fraser, "has stood not less, but infinitely more secure and sacred, since separations *a mensa et toro* for adultery, which were extremely common under the Popish jurisdiction, fell into total disuse; and the number of actions for divorce *a vinculo* has, in proportion to that of the population, remained nearly the same at all periods since the commissaries were first appointed in 1563, down to the present time." (H. and W. 1141.)

## 3. Adultery.

218. Divorce for adultery was not introduced into Scotland by statute; but immediately after the Reformation it was held by the courts, as a consequence of that event, to be the common law. (Stair, i. 4. 7; Ersk. i. 6. 37.)

219. Divorce is equally competent in Scotland, whether the

crime of adultery has been committed by the husband or the wife; while in England a wife cannot obtain divorce on the ground of the husband's adultery alone, but only where the adultery is combined with cruelty.

220. It is not adultery if one spouse (say the wife) has been constrained by force to suffer connection with another than her husband; or if the intercourse has taken place by mistake, she believing the person to be her husband. (Fraser, 1142; Thomson v. Bullock, Dec. 9, 1839, F. C.; and M'Donald, May 5, 1842, Brown's Just. Rep.)

221. Neither is it adultery if, acting on a belief in his death, founded on false intelligence, or other reasonable grounds, she have married another. (Fraser, *ut sup.*)

222. The action is competent only to the aggrieved spouse. It is not competent to his or her heir or creditor, though they, or any other parties interested in the defender of an action of divorce, may competently state defences. (Fraser, 1145.)

223. The Conjugal Rights Act of 1861 (24 and 25 Vict. c. 86) provides (sec. 7) that in every action of divorce at the instance of the husband it shall be competent to cite, as a co-defender along with the wife, the person with whom she is alleged to have committed adultery; and it shall be lawful for the Court to decern against the person with whom the wife is proved to have committed adultery for the payment of the expenses of the process. It is, moreover, provided that it shall be competent to examine the alleged paramour as a witness, notwithstanding his being a co-defender in the cause; and in the power of the Court to dismiss the action against him, if in their opinion such a course is conducive to justice. The subsequent section (8) provides that the Lord Advocate may enter appearance in all actions of nullity of marriage and divorce, either at his own instance or at the suggestion of the Court. The respondent cannot plead that he was in ignorance that the defender was a married woman. (Kydd v. Kydd, May 14, 1864,

2 M. 1874.) It is not necessary to prove the identity of the co-respondent. (Bell's Prin. 1530.)

224. If the Scotch courts have jurisdiction over the defender, divorce will be granted, though the adultery was committed abroad, and though he be absent from the country at the time of raising the action. (Fraser, *ut sup.*) In this case it is required by 24 and 25 Vict. c. 86, sec. 10, that the summons shall be served upon the defender personally, unless it can be shown that he cannot be found; in which case edictal citation shall be sufficient. Where the husband has acquired a foreign domicile, it is incompetent for him to sue for a divorce in Scotland [unless the *matrimonial* domicile of the parties has remained there. (Jack, 1862, 24 D. 867; Hook, *ib.* 488.) According to the dicta in a recent case (Stavert, 1882, 9 R. 519), the existence of a "matrimonial domicile" in reference to divorce—i.e. a domicile founding jurisdiction in an action at the instance of the wife which is other than the husband's domicile of succession—would appear, notwithstanding these decisions, to be still an open question, and one on which a considerable difference of opinion might be anticipated on the bench. (See also Pitt, 1862, 1 M. 106, H. L. 4 Macq. 627; Wilson, 1872, 10 M. 573; Fraser, 1276 *et seq.*, who is of opinion that such a domicile does exist.) The point appears to be unsettled also in England. (Briggs v. Briggs, L. R., E. D. 163)].

225. Divorce can be granted only by the Court of Session; and residence for forty days in Scotland [was formerly held sufficient to] render the defender amenable to the jurisdiction of that Court; [and it was] decided that such a domicile of jurisdiction, as it is called, acquired by the husband, [did] not change that of a wife to Scotland; and, consequently, that she [could] not be sued in an action of divorce, unless she herself [had] been personally resident in Scotland for forty days. (Ringer v. Churchill, Jan. 15, 1840.)

226. The pursuer must also have resided forty days, in all

cases in which he had no other connection with Scotland. (*Shields v. Shields*, Dec. 1, 1852.) It may be remarked that actions of divorce which are brought into the Scotch courts by foreigners, and apparently for no other reason than to avoid the jurisdiction of the courts of a country in which this remedy is less easily obtained, are regarded by the judges with great suspicion. No case has occurred in which there has not been a longer residence than forty days on the part either of the pursuer or the defender; and should such a case be presented to them, though it is difficult to see on what principle they could dismiss it, there is no doubt that the courts would deal with it very reluctantly. [The old jurisdiction of forty days' residence has now been abandoned, and the Court will refuse to entertain an action of divorce where the parties are not domiciled in Scotland, or where the "matrimonial" domicile above referred to exists there. (*Fraser*, 1275.)

227. [Such is also the case with another former ground of jurisdiction, said to be founded *ratione delicti commissi*, — that is to say, where the adultery was committed in Scotland, and the defender, having neither domicile nor residence, was personally served with a summons there. (*Stavert, supra*.)

228. [The subject of *domicile* belongs rather to Private International Law than to a work of the present scope. Domicile has been defined as "the place where a person has established the principal seat of his dwelling and his affairs." It is of three kinds, namely, domicile of origin, which is acquired at birth; of choice; or fixed by operation of law, as that of a minor or wife. It is, perhaps, best expressed simply as a person's "home." (*Fraser*, 1251 *et seq.*; *Dicey on Domicil.*)]

229. In order to prevent spouses who have become tired of each other's society from entering into a private compact to obtain a decree of divorce, the pursuer is called upon to swear that the action is not collusively raised; and the Lord Advocate

may now appear for the public interest. (24 and 25 Vict. c. 86, sec. 8.)

230. *The oath of calumny* is to the effect that the pursuer has just cause to insist in the present action; that he believes the defender to have been guilty of adultery; and that the facts stated in the condescendence (which is read to him at the time) are true; that there has been no concert or collusion between him and the defender in raising the action; nor does he know, believe, or suspect that there has been any concert or agreement between any other person and the defender on his behalf. (Fraser, 1145, 1195, and 1249.)

231. It has not been found practicable to lay down any rule as to what shall amount to collusion; and it is therefore to be feared, notwithstanding the stringency of the oath, that a secret understanding between the parties is not uncommon. It may be stated, on the one hand, that simple knowledge, on the part of the pursuer, that the defender wished him to succeed in his action, would not be collusion; whilst, on the other, an agreement that the husband, say, should commit adultery, in order that the divorce might be obtained, certainly would. (Paul v. Laings, March 7, 1855; Dickson on Evidence, p. 779; [Graham, 1881, 9 R. 327].)

232. In *proof of adultery*, the first act to be established is marriage; for where there was no marriage there can be no adultery.

233. *Presumptive evidence of adultery* is admitted as sufficient, because that fact is one which, less than almost any other, admits of being established directly; and unless it were competent to arrive at it by a train of circumstances, no protection whatever could be given to marital rights. (Fraser, 1151.) The rule, however, is one which will be applied with great caution.

234. The parties to an action in consequence of adultery, and their husbands or wives, may be witnesses in such action, provided no such person be "liable to be asked or bound to answer any

question tending to show that he or she has been guilty of adultery," unless such witness have already given evidence in disproof of his or her alleged adultery. But the Act is not to effect the existing law as to actions of declarator of marriage founded on promise and *copula*. (37 and 38 Vict. c. 64.) On this enactment two decisions have been pronounced which at first sight appear hardly consistent, but it is apparent that the later is merely an extension of the earlier one. The earlier case (Kirkwood, 1875, 3 R. 235) decides that the provision in the Act is for the protection of the witness and not for the benefit of the defender, and that, if the witness is willing, after being cautioned by the judge, to answer any such question, the defender has no privilege entitling him to insist that the witness shall avail himself of the enactment. The later case (Cook, 1876, 4 R. 78) holds that a witness shall not be put in the position of having to refuse to answer; and that when any such question is put, it is the duty of the judge to object, and to prevent the question and the witness's declinature to answer from being recorded.

235. It is impossible to indicate universally what circumstances will warrant the conclusion that adultery has been committed, because, as Lord Stowell has remarked, "they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances, apparently slight and delicate in themselves, but which may have most important bearings on the particular case. The only general rule that can be laid down is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion." (Loveden v. Loveden, 2 Hagg. p. 23; see also Burgess v. Burgess, *ib.* p. 226.)

236. [*Lenocinium*.]—Divorce will not be granted where the injured party has connived at the crime of adultery. This plea [which is known as *lenocinium*] has never been put forward in Scotland in bar of an action of divorce, except by the wife;

[and there is only one reported case in which it has been sustained as a defence at her instance. (Marshall, 1881, 8 R. 702.)]. But in England it is competent to the husband (*Turton v. Turton*, 3 Hagg. 338), and probably would be held to be so in Scotland also, if a case similar to the well-known scriptural one (Genesis xvi. 2) were to occur. It arises where the husband becomes the instrument of his own dishonour, by conniving at his wife's adultery, or inciting her, directly or indirectly, to the commission of the crime. (Ersk. i. 6. 46; Fraser, 1184 *et seq.*) [What constitutes *lenocinium* has never been strictly defined, and is always a question of circumstances. (Wemyss, 1866, 4 M. 660; Marshall, *supra.*)]

237. [*Condonation.*].—Again, if the party injured has been reconciled to the offender, he is held to have passed from his right to rescind the marriage contract, and his right to divorce is barred. (Fraser, 1176 *et seq.*)

238. The most pregnant circumstance in proving remission is always the voluntary continuance of matrimonial intercourse after the knowledge of the adultery. [Whether remission, or, as it is technically called, condonation, can be evidenced otherwise than by cohabitation—as by letters expressing forgiveness—has never been decided in Scotland; but it rather seems that actual cohabitation would be indispensable (Ralston, 1881, 8 R. 371), as it is in England, where the remission is not held to have been made until the husband has taken the wife back to his house, and re-installed her in her place at the head of his household. (Fraser, 1177.) The forgiving spouse cannot attach conditions to his or her condonation on violation of which it could be recalled. Once given, it is absolute and irrevocable. (Collins, 1882, 10 R. 250; aff. H. L. Feb. 18, 1884.)]

239. *Recrimination* is no bar to divorce in Scotland, though mutual guilt may affect the patrimonial consequences of the dissolution of the marriage. (Ersk. i. 6. 45, and note; Bell's Prin. 1535.) Recrimination, although not a competent defence

to an action of divorce, may be pleaded by way of a counter action. In England it is a competent defence ; and it is thought the English rule might with advantage be adopted in this country.

240. *Long delay* might raise a presumption that remission of the injury has taken place ; but it is not in itself a bar to an action of divorce. (Bell's Prin. 1533 ; Mortimer v. Mortimer, 2 Hagg. 313 ; Fraser, 1199.) The action for divorce is barred, or, having been commenced, falls by death ; but if after judgment of divorce in the Outer House the pursuer should die before the reclaiming note is heard, his representatives may sist themselves in the action. (Ritchie, 1874, 1 R. 826 ; see also Fraser, 1145.)

241. Desertion, cruelty, the neglect of conjugal duties, or the denial of conjugal rights on the part of one spouse, will not justify adultery in the other, or bar the action of divorce.

#### 4. *Malicious Desertion.*

242. Apostolic sanction has been claimed for divorce on the ground of desertion. (1 Cor. vii. 10, 11, 15 ; Stair, i. 4. 8.) As now recognised in this country, it is grounded on a statute (1573, c. 55), in which it is spoken of as resulting from the doctrines of the Reformation. It is recognised in all the Protestant countries of Europe except England, in America, and in those of our colonies in which the law has not been derived from that of England.

243. The first step towards obtaining a divorce on the ground of desertion, till very recently, was to raise an action of adherence. The pursuer having proved both the marriage and the desertion, decree of adherence was granted ; the Church (i.e. the presbytery, as coming in place of the bishop) was then called upon to admonish, and, if necessary, to excommunicate, the offender,—a duty which it invariably declined. If these warnings were disregarded, an action of divorce, reciting the procedure in the action of adherence and before the presbytery, was then pursued in the Court of Session.

244. All this has now become matter of history, the Conjugal

Rights Act of 1861 (24 and 25 Vict. c. 86, sec. 11) having declared it to be no longer necessary, prior to any action of divorce, to institute against the defender any action of adherence, nor to charge the defender to adhere to the pursuer, nor to denounce the defender, nor to apply to the presbytery of the bounds, or any other judicature, to admonish the defender to adhere. [An offer by the offending spouse to adhere, after the summons in the action of divorce has been served on him or her, comes too late to bar the action. (Muir, 1879, 6 R. 1353.)]

245. Desertion must be malicious; [and that not only in its inception, but during the whole period of four years;] and in the case of a defender who remains abroad, it will be necessary to prove that he does so with a deliberate purpose of abandoning his conjugal duties, and that he is not detained by the exigencies of the public service, or of his own private affairs. (Ersk. i. 6. 44; Walker v. Walker, Dec. 7, 1844; Duke v. Duke, March 1, 1845; [Barrie, 1882, 10 R. 208].)

246. [A defender who is undergoing a sentence of imprisonment for a criminal offence is not in malicious desertion during that period, though his desertion may have commenced before his sentence. (Young, 1882, 10 R. 184.)]

247. It was long doubted whether malice could be presumed, to the effect of allowing an action of divorce to proceed, without personal service and intimation to the defender. The point was rendered of much practical importance by the fact that the residence of the defender, in such cases, is very frequently unknown; and had such intimation been required, the injured party (usually the wife) would have been deprived of her legal remedy. It is now provided by 24 and 25 Vict. c. 86, sec. 10, that "in every consistorial action the summons shall be served upon the defender personally, when he is not resident within Scotland; provided always, that if it be shown to the satisfaction of the Court that the defender cannot be found, edictal citation shall be deemed sufficient." But where the citation is edictal,

the children of the marriage, if there be any, and one or more of the next of kin, must be called.

248. Any ground which would have justified a demand for judicial separation, will be a good defence against an action of adherence; *e.g.* cruelty on the part of the pursuer, that he committed adultery, and the like.

249. It would be a valid defence against an action of adherence or of divorce on the ground of desertion, in which the wife was pursuer, that the husband had required her to accompany him abroad, and she had refused; because she is bound to follow him throughout the world. (*Stair*, i. 4. 8; *Ringer v. Churchill*, Jan. 15, 1840; but see *Reid v. Reid*, July 10, 1823; *Fraser*, 1214.)

250. Action of divorce for desertion may be raised after one year's desertion, and proof taken; the divorce being given after the four years have elapsed. [This is stated by Bell (*Prin.* 1535), and there appears to be no other authority; and it has been recently called in question by the bench. There appears, on the other hand, to be no limit to the length of time at which the action may be raised, provided the desertion has been wilfully and maliciously persevered in during the whole period—in one case twenty-seven years. (*Mackenzie*, 1883, 11 R. 105.)]

### XII. EFFECTS OF DIVORCE.

251. Divorce being a complete disruption of the marriage tie, both parties are at liberty to marry again. To this rule there is one statutory exception. By 1600, c. 20, the offending spouse and the paramour, if named in the decree of divorce, are not permitted to marry; but this statute is generally supposed to be in desuetude (*Bell's Dict. Ross' edit.*), though Lord Fraser contends for the opposite view (*H. and W.* 144); and it is not unusual to omit the name of the paramour in the decree of divorce, for the purpose of evading the Act.

252. Where divorce has followed on the ground of desertion, it has been determined by the statute (1573, c. 55), as interpreted by Lord Stair, that "the party injurer loseth all benefit accruing through the marriage; but the party injured hath the same benefit as by the other's natural death." (Stair, i. 4. 20.)

253. If the husband be the guilty party, he is thus obliged not only to restore the tocher (dos), but he forfeits such conventional provisions as may have been made by the marriage contract (see Marriage Contract, p. 62) in his favour, together with his rights of courtesy and *jus mariti*. Should the wife, on the other hand, be guilty, she has no claim for the restitution of the tocher, nor for terce or *jus relictæ*, nor for any conventional provision in her favour by marriage contract. (Ersk. i. 6. 46.)

254. The innocent party in either case continues to be entitled to the legal provisions. The wife may claim her terce and *jus relictæ*, unless they are excluded by her contract of marriage, and the husband's right to courtesy emerges just as if she were dead. No right arising to the guilty party after the divorce can be claimed by the innocent; and if the guilty husband be insolvent, the wife cannot compete with his creditors, who are entitled to retain the tocher, the wife's share of the goods in communion, and to claim the courtesy; the reason being, that the wife is treated as a partner, who can have no claims until the company debts are first paid. If both parties are guilty, and each divorces the other, the rule of law is that neither of the spouses has any claim on the property of the other. (Thomson, 1871, 9 M. 1069.) A husband divorced for adultery has been held entitled to sue for moveable estate which vested in his wife before divorce, but which had not been paid. (Ferguson, 1877, 4 R. 393.)

255. The death of the defender before decree of divorce has been pronounced, bars these consequences; but where the pursuer dies, it is doubtful whether an action of divorce may not be taken up by his heir. (*Supra*, sec. 225.)

256. Divorce for adultery not having been introduced by legislative enactment, like divorce for desertion, but having its origin in the common law, its effects on the patrimonial interests of the parties can only be ascertained from the decisions of the Court. These have established the same general rule as that received in the case of divorce for desertion.

257. To this there would appear to be one exception. The tocher, which must be restored by the husband who has deserted his wife, may be retained by him who has committed adultery. (*Justice v. Murray*, M. 334; *Fraser*, 1222.) The grounds of this distinction are not apparent, [and as] to whether [it] may safely be regarded as settled, see *Nicolson's Erskine*, vol. i. p. 176, notes; and *Bell's Prin.* 7th ed. 1622, note *e*; *Fraser*, 1222; *Harvey*, 1872, 10 M. H. L. 26, Lord Westbury.

258. Donations by the innocent to the guilty spouse are revoked by divorce; those by the guilty to the innocent become irrevocable. (*Ersk. i. 6. 46.*)

### XIII. DECLARATOR OF NULLITY OF MARRIAGE.

259. A marriage, however celebrated, may be declared by the Court of Session to have been no marriage at all, if it be proved that any of the impediments to marriage above enumerated (*ante*, p. 12 *et seq.*) existed at the time when it was attempted to be contracted. (*Ersk. i. 4. 7.*)

260. Unlike actions of divorce, actions of nullity of marriage, on any other ground than impotency, may be instituted, not only by either of the parties to the alleged contract, but by any one having a patrimonial interest in setting it aside. (*Bell's Prin.* 1524.)

261. Along with the conclusion for nullity, a conclusion for damages is sometimes inserted against the party, who, knowing of the impediment to the marriage, yet entrapped the other into the connection. Damages in such a case are generally high,

on account of the peculiar aggravation of the wrong. (Fraser, 139.)

#### XIV. CONSISTORIAL ACTIONS.

262. *Consistorial actions*—i.e. declarators of marriage, nullity of marriage, declarators of legitimacy and bastardy, actions of divorce and separation—must now be brought before the Court of Session.

263. No decree can be pronounced in any of these actions in absence of the defender, or even on his admission, unless substantiated by other evidence. (11 Geo. iv. and 1 Will. iv. c. 69, sec. 36; *Muirhead v. Muirhead*, May 28, 1846.) The reason of this rule is the extreme importance to society of the true status of its members being positively ascertained. But actions of aliment between husband and wife are to be deemed summary causes both in the Outer and in the Inner House; and when no appearance is entered for the defender, decreet shall be pronounced in absence, without proof, as in other cases before the Court of Session. (24 and 25 Vict. c. 86, sec. 15.)

264. In actions for separation and divorce, the Court may make interim orders without respect to children. (Ib. sec. 9.) By the same enactment (sec. 13) it is provided that the Lord Ordinary shall take proofs in consistorial actions in place of Sheriffs Commissary, to whom compensation is granted.

#### XV. MARRIAGE CONTRACTS.

265. Having considered the rights and obligations of married parties which spring from the common or the statute law, it is proper to treat of the class of deeds by which these provisions may be altered to suit the views of the parties, or the circumstances of the particular case.

266. The various rights which may require to be adjusted, and the many contingencies against which provision may have

to be made, render the subject one of great intricacy, which can here be treated only in the most general manner.

267. It is competent for the parties to a marriage to make any conditions with each other which are not inconsistent with the conjugal relation, or in violation of morality or of public law.

268. Marriage contracts differ very essentially in their effects, according to whether they are entered into before or after marriage.

269. In *ante-nuptial* contracts, the stipulations are conditions of the marriage: hence they are onerous,—effectual not only against the parties themselves, but against creditors. But if the husband be insolvent, and the provision to the wife unreasonable and immoderate, it will not be sustained in a question either with the creditors or the heir, at least of a prior marriage. It is thought, however, that in this class of cases the phrase “reasonable provision” would receive a rather liberal construction. (Bell’s Com. 638.) This subject was discussed in *Carphin v. Clapperton*, May 24, 1867, 5 M. 797; and the judges all seemed to concede, and particularly Lord Neaves, that marriage contracts are not onerous so far as provisions made in contemplation of them are excessive; but the measure of the rationality of the provision is not to be weighed in nice scales. (Miller, 1871, 10 M. 107; aff. 1875, 2 R. H. L. 62; Watson, 1874, 1 R. 882.)

270. By *post-nuptial* contracts, again, no alterations to the prejudice of creditors, and in favour of the wife and children, can be made, because the interests of the latter have already been identified with those of the husband and father. Even the right to their legal share of their father’s property, which arises to the children by the unconditional marriage of their parents, is independent of such contracts. (Stair, ii. 3. 41, 5. 19. 6 *passim*, 8. 45; Ersk. i. 6, iii. 3. 30, 8. 38; Bell’s Prin. 1941; Miller, *ut sup.*)

271. Two highly convenient provisions of the common law,

by which some species of conventional arrangement was rendered almost a matter of necessity, were removed by the Moveable Succession Act. It is now no longer necessary to stipulate that, where the wife shall predecease her husband, her representatives shall not be entitled to carry off a share of the goods in communion, even in the case in which these goods belonged originally to the husband, nor that a marriage dissolved within year and day shall have the same patrimonial effects as if it had subsisted for a longer period. (18 Vict. c. 23, secs. 6 and 7.)

272. The main object of a marriage contract is to provide against the consequences of the misfortune or imprudence of the husband, by placing in the hands of trustees, or otherwise setting apart, a separate estate or fund for the wife. This may be done either with the rents of heritable property, or with moveables; and the arrangement may proceed either from a third party conveying to the wife, under the provision that the husband's interest shall be excluded, or it may be made before marriage by the wife herself with her own funds, or by the husband with his funds.

273. In general, such conventional arrangements must be made expressly; and unless the *jus relictæ* is excluded in words, the wife will continue to be entitled to it, notwithstanding any stipulations that may have been made in her favour. (Ersk. iii. 9. 16 and 25; Howden v. Crichton, May 18, 1821; Fraser v. Rankin, Dec. 17, 1835.) But as regards terce, the reverse is declared to be the case by statute. (1681, c. 9.) Even after marriage, if the husband be solvent at the time, he may set apart a separate fund, of "reasonable amount," for the support of his wife. (Fraser, 1500.) But recent decisions seem to indicate that, because the husband is always bound to aliment his wife, such provisions would not receive effect until after the death of the husband; in other words, that the husband's creditors could claim the yearly profits during his life.

274. Provision may also be made for children in this manner.

the term of payment be during the father's life, or on the occurrence of an event which may happen during his life, such as majority or marriage, the children are entitled to a preference over provisions have been secured by infeftment, and to rank as creditors if they have only a personal obligation for them; if the provision be payable after the father's death, it only amounts to a *spes successionis*, and does not found a right to rank as creditors. These provisions, like those for the wife, must be construed in the circumstances of the parties. (Fraser, *ut sup.*; *Rey v. Campbell*, May 24, 1825.)

5. It is not unusual, where there is heritable property, to appropriate certain lands to the wife in liferent, along with a dower-house; and these provisions, called a *locality*, if accepted as such, will be held to come in lieu of terce; but no express provision made for the husband will exclude the courtesy unless specially renounced. (Bell's Prin. 1948.)

6. In place of having certain specific lands set apart to her, the wife is very commonly secured in an annuity by infeftment. This provision is called a *jointure*. (Bell's Prin. 1947.)

7. The subject of special destinations in family deeds is one of the most vexed and intricate in our law; and any rules that have been laid down can at best serve as mere indications of what is the true construction in any given case. These rules may be briefly:—

1.) The intention of the maker of the deed, as gathered from the deed itself, giving to technical words their technical signification, is to receive effect. (Ersk. iii. 8. 34.)

2.) In feudal and quasi-feudal subjects, as the fee can only be in one person, it is generally presumed to be in the husband. Special destinations to the husband and wife in *conjunct fee*, or in *unct fee and liferent*, or to *husband and wife simply*, though they may be a destination to heirs, mean that the wife is merely life-tenant, that the husband is *fiar*, and that the children have only a *spes successionis*, which cannot be defeated gratuitously

if the destination occur in an ante-nuptial contract. (Ersk. 8. 36; Bell's Lect. vol. ii. 777, and cases there noted.)

(3.) But where the property destined was originally the wife's own, the law would, even under such destinations as are mentioned in the second rule, hold her to be the *fiar*, unless the deed in terms contradicted this, or it was shown that they were given as to her. (*Myles v. Calman and Others*, Feb. 12, 1857, 19 408.) In that case, the Lord President (Colonsay) remarked that the meaning of such destinations, where the property came for the wife, was, that in the event of the wife's survival she was to have both the liferent and fee.

(4.) Again, if a power of disposal is reserved to either spouse, the fee necessarily is where that power is located; and so the party whose heirs are favoured by the destination will, in the absence of a contrary intention in the deed, be deemed the *fiar* (Bell's Lect. ii. 778.)

(5.) If the destination be to the spouses in conjunct fee a liferent, and the survivor, and their heirs, without any further specification, the survivor is presumed to be the *fiar*. If where the destination is specifically to the heirs of the marriage, the fee is held to be in the husband, though predeceasing, as to the heirs of the marriage are his heirs. (Ib.)

(6.) These rules do not apply to moveables, as in regard to them division is to be presumed. The only rule we can lay down is, that the words of the destination are to be literally construed.

278. It is by marriage contracts, also, that conjunct rights between parents and children are usually constituted. The general rule in these cases is, that where the right is taken to the father a liferent, and to the children that may be born of the marriage in fee, the father is *fiar*, the children having merely a right of succession, which is defeasible by the father's creditors. But the right may be to the father "for his liferent use *allanarly*," and to his children, even though the contract be ante-nuptial and to

children unborn, the father's right will be limited to a fiduciary fee for the children's behoof, and will not be affected by the father's debts. (Bell's Prin. 1956; Fraser, 1440 *et seq.*) But if the destination be to the father in liferent, and to a child or children *nominatim* in fee, the father has only a liferent, and the child is either absolute fiar or fiduciary for himself and the other children. (Spence, March 25, 1829; 3 W. and S. 380.)

279. Where the destination is to "husband and wife in conjunct fee and liferent, and children in fee," the meaning is, that the spouses shall each have a joint liferent and a *possible fee* while they both live, it being uncertain which will survive. (Ersk. iii. 3. 30, and 8. 38; Fraser, *ut sup.*)

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## CHAPTER II.

### OF PARENT AND CHILD.

#### I. LEGITIMACY.

280. Legitimacy is the personal status which results from birth in lawful wedlock.

281. But though this is the usual, it is not the exclusive ground on which legitimacy is secured. From views of expediency, public policy, and humanity, all the legal privileges of the status are extended to certain cases where no marriage was entered into. (Sec. 283 *et seq.*)

282. The case of a posthumous child can scarcely be regarded as an exception to the general rule; for he, at all events, was conceived in wedlock.

283. If a child be born beyond ten months after the marriage is dissolved, he will scarcely be legitimate. Neither will the rule, that "he is the father whom the marriage points out,"

necessarily decide the case in which a child is born within six months after the marriage is contracted, though it will lay the onus of proof on the party who impugns the legitimacy. But unless the paternity is impossible or disproved, the child, as in the case of bastards, will be legitimated by the subsequent marriage of his presumed parents. (Fraser, Parent and Child 1 *et seq.*)

284. The presumption in favour of legitimacy which is raised by the marriage, will be invalidated by proof of physical impossibility, whether grounded on the impotency or the absence of the reputed father. Very strong evidence to the effect that no sexual intercourse took place between the husband and wife will have the same effect, even where it does not amount to proof of impossibility. (5 Clark and Finn. 229; Nicholas on Bastardy, 181; *Sandy v. Sandy*, July 4, 1823; Fraser, 5 Montgomery, 1881, 8 R. 403.) Where a man knowingly marries a woman advanced in pregnancy, there arises a presumption very hard to rebut, that he is the father of the child. (Gardner 1876, 3 R. 695; 1877, 4 R. H. L. 56. [(Reid, 1879, 6 R. 659.)

285. *The period of possible gestation*, though of extreme importance both in questions as to legitimacy and as to the paternity of bastard children, is so much disputed amongst medical men, that the courts have been unable to determine it with an degree of accuracy. It is generally admitted that the ordinary period is ten lunar months, forty weeks, or 280 days (equal to nine calendar months and a week); and the presumption will tend to become adverse to the alleged legitimacy or paternity in proportion to the extent to which the period assigned for the gestation falls short of or exceeds this period. (Beck, Med. Juris. 356; Taylor, Med. Juris. 611; Fraser, 11 *et seq.*) [A possible gestation of 305 days has been sustained. (Cool 1880, 8 R. 217.)]

286. A putative marriage is one in which both or either of the parties believing that they could marry entered into the

contract, while there was an unknown impediment arising from relationship, previous marriage, or the like, which prevented a valid marriage. In this case the children would probably be held to be legitimate, though the marriage itself is null. (Brymer v. Riddell, 1811; Bell's Report of Putative Marriage; Lord Jeffrey in *Kerr v. Martin*, Mar. 6, 1840.) Lord Fraser holds that the children of such a marriage, where even only one of the spouses is in *bona fide*, are legitimate; but that such a marriage would not have the effect of legitimating issue born before it was entered into. The spouse in *bona fide* has his or her legal provisions. The spouse in *mala fide* has no parental power over, or right of succession to, the children. But to this effect it would seem to be necessary that the marriage be entered into publicly and after proclamation of banns. (H. and W. i. 151 *et seq.*; P. and C. 28.)

287. All children conceived after the impediment has come to the knowledge of both parties will be illegitimate. (Fraser, 29.)

288. It is the opinion of some that a child born of a woman from a rape perpetrated on her would be legitimate, but there is no authority on the point in the law of Scotland. (Ib. 30.)

289. Bastards may be legitimated in two ways: *1st*, By the subsequent marriage of their parents; and *2nd*, By letters of legitimation from the Crown.

290. *Legitimation by subsequent marriage*, which is not admitted in England, was borrowed from the later Roman practice, into which it was introduced by Constantine, at the instigation, it is supposed, of the Christian clergy, and from considerations of morality and expediency. It certainly tends to encourage the conversion of a relation which was injurious, into one which is beneficial to society; and it has the further advantage of preventing those unseemly disorders which must arise in families where the elder-born children of the same parents are left under the stain of bastardy, whilst the younger enjoy the

status of legitimacy. (As to the history of the law and the period of its introduction into Scotland, see Ersk. App. No. 2, and Fraser, 32 *et seq.*)

291. Legitimation by subsequent marriage confers all the legal rights attaching to legitimate birth, and enables the child to take under a destination to lawful children. Ersk. i 6. 52; Bell's Prin. 1627.)

292. An important question remains open, as to the rights of children legitimated *per subsequens matrimonium*, in competition with those of legitimate children born of a marriage intermediate between the birth and legitimation of the others. (Fraser, 39.) This question is keenly debated; and although it would be beyond the scope of the present work to reason out the matter, it is thought that the child of the intermediate marriage would be preferred, at least as the heir in heritage.

293. *Legitimation by letters from the sovereign*, in imitation of the power exercised first by the Roman emperors, and subsequently by the popes, though not unknown to the law of Scotland, is very limited in its effects. It will not entitle the bastard to succeed to a relative dying intestate; but it confers on those who would have been his heirs-at-law, had he been legitimate, the right to succeed him, which, failing lawful children, would have fallen to the sovereign himself. In granting legitimation to this extent, the sovereign thus only resigns his own right, without interfering with the rights of third parties. (Ersk. iii. 10. 7.)

294. Formerly bastards could not test; and the letters of legitimation consequently contained a clause conferring this power upon them. The statute 6 Will. iv. cap. 22 removed this inability.

295. Many international questions of great nicety, into which we cannot here enter, have arisen out of our recognition of legitimation by subsequent marriage, and its rejection by our

English neighbours, and by those States in America that have followed the English law.

296. The regulating fact is the domicile of the father; but whether his domicile at the period of the marriage or of the birth of the child is to prevail, supposing them to conflict, is still an undecided point. (Fraser 45 and 1 Burr's Com. 104.) It would seem that the period of the birth ought to prevail, because, after birth, and while in the family, the father can change their domicile as often as he changes his own. (Guthrie's Savigny, p. 57.) But see Fraser, p. 52.

297. In the case of real property, the law of the country in which it is situated prevails. Thus it has been held that a child legitimated *per subsequens matrimonium* in Scotland cannot succeed to lands in England. (Birtwhistle v. Vardhill, 2 Clark and Finn. 571, and 7 Clark and Finn. 895.)

## II. THE PATERNAL POWER.

298. The power of the father over the child is recognised, to a greater or less extent, by all systems of jurisprudence, and is generally greatest in the rudest conditions of society. Authorities differ as to the period at which, by the law of Scotland, the child passes entirely beyond the control of the father. In so far as the person is concerned, his power of constraint probably ceases at the legal age of puberty, both in males and females. (Stair, i. 5. 13; Fraser, 65.)

299. The father is entitled to the custody of the child, and may remove it from place to place, and from one country to another. He can recover its person from any one who detains it, and, after infancy at all events, even from the mother. (Fraser, 67.)

300. The father has the power of inflicting moderate chastisement; and he may lawfully compel the child to labour, when able to do so, for the subsistence of the family. (Ersk. i. 6. 53; Borthwick, Dec. 20, 1845.)

301. The powers of the father do not terminate with divorce probably not even where he is the guilty party. (Fraser, 73 but see *Harvey v. Harvey*, June 15, 1860.) [Neither is his power to regulate the place of residence and education of his children in this country terminated or suspended by his own residence abroad. (Pagan, 1882, 10 R. 1072.)]

302. In the case of a daughter, the father's power, both as regards person and property, terminates with marriage, as she thereby passes under the authority of her husband. (Ersk i. 6. 56.)

303. The power of the father may be controlled by the Court of Session, as the supreme court of equity in this country; but a strong case will require to be made out that it is vicious and immoral, or cruel and oppressive. (*Harvey*, June 15, 1860.)

304. Refusal to aliment or educate his children might amount to such a dereliction of paternal duty as to be regarded by the Court as involving a forfeiture of paternal power. The case of a father in this respect, however, differs essentially from that of tutors, where the Court will compel them to educate the pupil in a manner suitable to the rank, status, and property he will enjoy on arriving at manhood. (Fraser, 80.) Of the proper amount of education beyond what may be necessary to enable the child to obtain a subsistence, the father is the absolute judge; and it is doubtful if he can be compelled to apprentice his child to a trade, or make him acquainted with any kind of skilled labour.

305. None of the powers of the father belong to the mother in the case of legitimate children; but she will be preferred to the custody of illegitimate children, under seven years if males and ten if females. (Smith's Digest of the Poor-Law, p. 136.) An offer by the father of an illegitimate child, seven years of age, to bring it up in his own family, is an answer to a demand for aliment by its mother. (*Corrie v. Adair*, Feb. 24, 1860; *Harvey*, June 15, 1860.)

## III. DUTY OF THE FATHER TO ALIMENT THE CHILD.

306. So decidedly do the laws of this country recognise the obligation which nature has laid on the father to aliment the family which he has gathered around him, that refusal to comply with it, if either wife or child shall in consequence become chargeable to the parish, is punishable by fine and imprisonment as a crime, under the Poor-Law statute (8 and 9 Vict. c. 83, sec. 80).

307. But when the period of childhood is past, the obligation which lay on the father is held to be transferred to the children; and thus, if an indigent person has both a father and a son alive, the burden of his maintenance will fall, in the first instance, on the son. (Brown, 1710; M. 448; Fraser, 85; *Muirhead v. Muirhead*, July 7, 1849, and Dec. 15, 1849.)

308. In the event of the descendants of a party being unable to aliment him, the obligation falls on the father, as the nearest ascendant, then on the mother, and after her on the paternal ascendants in the order of their proximity. When the paternal ascendants are exhausted, it would seem that a claim exists against maternal ascendants. (Dunlop, Poor-Law, sec. 36.)

309. Collaterals are not bound to aliment each other; the only apparent exception being that of an elder brother who has succeeded to his father's estate. In this case, however, it is not as the brother, but as the father's representative, that he is bound to fulfil the obligation which lay upon him of providing for the subsistence of the younger members of his family. (*Drummond v. Swane*, Jan. 25, 1834.)

310. The amount of aliment which the law will enforce is merely "support beyond want, and all beyond that is left to parental affection." (House of Lords, in *Maule v. Maule*, June 1, 1825.)

311. The only case in which a separate aliment will be

decreed to the child, is where the parent offering to receive him into family has formerly maltreated him, or where his person or morals are in danger. (Ersk. i. 6. 56.)

312. The rule is different where a descendant offers to take an ascendant—*e.g.* a grandfather—into family; and the Court will not enforce such an arrangement. (Jackson, Nov. 17, 1825 White, March 10, 1829; Dunlop, sec. 41.)

313. A father, being bound to aliment his child, is held to have given authority to the latter to contract for necessaries and thus to found an action against him to that extent, where he has not otherwise fulfilled the parental obligation. (Ersk. i. 6. 57; Fraser, 95.)

314. The father is not liable for the child's crimes, or even for his quasi-delicts. He is not bound to pay a fine imposed upon him, nor would he be liable for damages should the child break his neighbour's windows, demolish his trees, or slander him, unless by manifest negligence he connected himself with the wrong done. (Haddan v. Stainhouse, 1 Br. Supp. 237 See also, by way of illustration, Fleming v. Orr, House of Lords April 3, 1855.)

315. If the child be working at a trade or profession, by which he is able to earn as much as will support him, he cannot demand aliment from his father. (Stair, i. 5. 7; Ersk. i. 6. 58.)

316. In the higher ranks, where children are educated to liberal professions in which employment is precarious, the mere name of a profession, such as advocate, or doctor of medicine without practice, is not enough. The principle on which the Court in this case holds the father liable in aliment is, that by training his child to such a profession he tacitly becomes bound to maintain him till he receives employment. (Ayton v. Colvil M. 390; Maule v. Maule, *ut supra*.) If the failure of the son has arisen from his dissipated and irregular habits, the Court will not interfere. (A. B., March 9, 1848.)

317. When the child has been trained to no profession or

trade, the obligation of the father subsists after majority; but only so long as is necessary to enable the child to acquire a trade, or support himself by taking service, if born in the lower ranks. (*Samson v. Goldie*, Hume 425.)

318. If a child has a separate fortune of its own, it is thought that the parents are not bound to maintain him, and may claim board if they do so. (*Fraser*, 104; *Hamilton v. Hamilton*, July 11, 1834; *Menzies v. Livingston*, Feb. 27, 1839.)

319. Daughters in the higher ranks must be alimented till marriage; in the lower, till they are of age to go to service. (*Cairns v. Bellamore*, M. 410; *Dunn v. Matthews*, Jan. 22, 1842.)

320. The obligation to aliment a married daughter lies on her husband, even where she continues to reside in family with her father; and if he is unable to implement his obligation, it falls on his father before her father. (*Dunlop's Poor-Law*, p. 38; see *infra*, "Poor;" *Wallace v. Goldie*, July 20, 1848.) But if the son should die, there is no obligation on his father to support the widow. (*Hoseason v. Hoseason*, Oct. 21, 1870, 9 M. 37.)

321. A child is equally bound to aliment an indigent parent. (*Fraser*, 114.) To support the latter's claim it is necessary to establish (1) that the parent is indigent, and (2) that the child has a superfluity after providing for himself and his own family. (*Hamilton*, 1876, 4 R. 688.) A daughter, if possessed of sufficient means, is bound to aliment her mother (*Muirhead*, July 7, 1849), and a granddaughter her grandmother. (*Ib.* Dec. 15, 1849.) [A son-in-law is also bound to support his wife's indigent parents during the marriage, on the principle that he has taken over his wife's obligation to do so; and that equally whether he has received any estate through his wife or not. (*Reid*, 1866, 4 M. 1060.)]

322. The obligation to aliment is not affected by any amount

of extravagance or improvidence on the part either of parent or children, and it cannot be removed by compact between them (Fraser, 106.)

323. The heir is bound to aliment both sons and daughter till their provisions become due. Whether he would be entitled to claim repetition would depend on the relative extent of the provisions, and the other circumstances of the case. (Ib. 107.)

324. The duties of reverence and obedience have no "civil remedies" (Stair, i. 58); but it is declared by the statute 1666 c. 20, that where a child above the age of sixteen, and not being distracted by harsh or cruel treatment, shall beat or curse a parent, he shall be punished with death. The pains of law are usually restricted. (Fraser, 113.) In less serious cases such offences are tried at common law in the police courts, the relationship of the parties being regarded as an aggravation.

325. *Bastards* have no father in the eye of the law; but the doctrine is not allowed to apply to questions of aliment. The law of Scotland holds both the father and mother liable to aliment, and the question is generally raised by an action at the mother's instance against the father. (Ersk. i. 6. 56 Fraser, 120.)

326. The future aliment of a natural child forms a debt against the deceased father's estate. (Ib. 124.)

327. Failing the father and mother, the burden of supporting a bastard falls on the parish where the mother has her settlement. (*Infra*, "Poor.")

328. If a stranger should aliment the child, he has an action of relief against the father, mother, and parochial board (Matheson v. Hay, Dec. 23, 1831.)

329. The right to arrears of aliment is not cut off by the triennial prescription. (Thomson v. Westwood, Feb. 26, 1842)

330. In the case of bastards, as of legitimate children (*ante* sec. 294), the rank or fortune of the parents will scarcely be taken into account in fixing the amount; "support beyon

rant" being all that can be legally vindicated. (*Lamb v. Paterson*, Dec. 6, 1842.)

331. Aliment, as a general rule, will be due till the child is able to earn a subsistence (*Adair v. Corrie*, Feb. 24, 1860); and it will be claimable during life, if it be physically or mentally incapable of supporting itself. (*Marjoribanks v. Amos*, Nov. 13, 1831.)

332. The mother of a bastard child is entitled to claim from its father a sum for inlying charges; and in peculiar cases the Court have allowed a claim against the father for medical attendance and school fees to the child; "thus, in truth, imposing on the fathers of illegitimate children the peculiar obligations incumbent on the fathers of lawful offspring." (*Fraser*, 127.)

333. The custody of bastards belongs to the mother; but her claim for aliment, when the child has passed the age of seven in the case of sons, and ten in that of daughters, will be barred by an offer on the father's part to take the child into his own keeping. (*Adair v. Corrie*, Feb. 24, 1860. See sec. 296.) The father may claim the custody of the child, however, even at an early age, if his object be to teach it a trade, and thus put it in a position for acquiring a subsistence.

334. In general, when the child is in infancy, the Court will leave it with the mother, however mean her rank, or however great its prospects or its fortune. But when the father is dead, and the child has passed the age of seven, if it has succeeded to extensive means, it will be taken from the mother and delivered to trustees, to be educated in a manner befitting its future position. (*Baxter v. Dougal's Trustees*, July 5, 1825; *Whitson v. Speid*, May 25, 1825; *Fraser*, 130.)

335. A mother is liable to aliment her indigent child, though he have squandered his fortune, and be major (*Macdonald v. Macdonald*, June 20, 1846); but a step-mother is not liable to aliment a step-son. (*Fraser*, 86.)

336. The protection and guardianship of infants, formerly exercised by the Scotch Privy Council, now belongs to the Court of Session as the supreme court of equity. (Baillie v. Agnew, Br. Supp. v. 526; and Lord Bute's case, Stuart v. Moore, Nov. 23, 1860, and March 20, 1861.)

337. In actions of aliment a lower degree of evidence was by the former practice, held to establish the presumption of paternity than would have been necessary to prove a fact in another action. This evidence was supplemented by the oath of the pursuer. (Fraser, 132.)

338. As to the amount of evidence requisite to admit the oath in supplement, it was said by Lord President Blair to be such "as induces a reasonable belief, though not complete evidence;" and this opinion has been affirmed by the Court with the observation that "it has been oftener quoted, and has been the foundation of more judicial decisions, than any other opinion that ever was delivered." Wherever the oath emitted in supplement was at variance with special facts already established by proof, the defender was assoilzied, though the general question was answered in the affirmative. It was, in short, nothing more than the evidence of the pursuer, which, since the recent change of the law of evidence, is competent in all actions. (Ib. 133.)

339. It is now held that, in actions of filiation and aliment the testimony of the mother of an illegitimate child, given by her in the position of a witness, is liable to be tested by cross-examination, and its credibility weighed by the rules which apply to the testimony of other witnesses; and an opinion has been expressed to the effect that the oath in supplement is no longer competent. (Scott v. Chalmers, Dec. 2, 1856; Fraser, 138.)

340. Children are the natural heirs of their parents, and are entitled to succeed to their whole property, both heritable and moveable, where they die intestate. As regards heritage, this right may be wholly defeated by the parent by means of a con-

veyance in favour of a stranger, executed whilst in vigour, though intended to take effect only after death. There are certain rights, on the other hand, which the child possesses over the parent's moveable property, of which he cannot be deprived by the parent's deed, intended to take effect after death, whether executed in point of form *inter vivos* or *mortis causa*. The child's claims, however, do not affect the father's right to alienate his property during his lifetime, or to contract debt. Of course the widow's rights (which are elsewhere explained) are as strongly founded as those of the children.

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## CHAPTER III.

### GUARDIANSHIP.

341. Guardianship, as it is called in England, or the government of those who are not possessed of full legal capacity, is divided by the law of Scotland, in accordance with the Roman law, into Tutor and Curatory.

342. The object of tutor is the protection of those in whom, from nonage, the law recognises no power to contract, to alienate, or to perform any other act inferring an obligation, to the constitution of which a consenting mind is requisite. (*Infans, et qui infantiae proximus est, non multum a furioso distant.*—Inst. L. iii. tit. xix. sec. 10.) The tutor thus stands in the pupil's place, and acts for him as he himself ought to do were he of perfect age. Although a pupil can do no act inferring civil responsibility, yet, should he marry during pupilarity, the marriage will be sustained, on the ground of acquiescence, provided he continue to cohabit after pupilarity is past. (*Ersk. Pr. i. 6. 2.*) He is also capable of being indicted and punished for crime after he has completed his seventh year. (1 Hume, 35.)

343. The object of curatory is to afford assistance in the management of their affairs to those who, though past pupilarity, have not attained majority, and to those, of whatever age, who, from infirmity of understanding, are incapable of dealing on equal terms with persons of entire capacity.

344. The tutor thus *grants* the pupil's deeds for him, whilst the curator *consents* to those of the minor.

345. Pupilarity, the period of life to which tutory applies, extends to fourteen in males, and twelve in females. It is to this period of life exclusively that the term infancy, which in England includes the whole period of nonage (Tomlin's Dict.), is applied in Scotland. Minority, to which curatory applies, extends from the termination of pupilarity to the age of twenty-one in both sexes. Majority, during which a sane man is subject to no guardianship, is the whole life after twenty-one. (Stair, i. 5. 3, 10. 13; Ersk. i. 1. 11, and i. 7. 1.)

346. By the Roman law, an *approach* to majority was held to modify the character of minority; and so of the other periods. (Inst. iii. tit. xix. sec. 10; Savigny, System des Heutigen Röm. Rechts, vol. iii. p. 37.) No such distinction is recognised by our law; and a youth who wants but a day of twenty-one will be as much incapacitated as if he were fifteen. Still Erskine says (i. 7. 1) that the law of Scotland makes some difference in each of the stages recognised by the Roman law; and to some extent the Court is no doubt guided by them in determining as to the expediency of leaving children in the custody of their mothers, granting them separate aliments, and the like.

#### L. TUTORRY.

347. In all cases in which pupils appear as actors, they must act by their tutors; but the reverse is the case where they are merely passive. Deeds granted by the pupil thus proceed from the tutor directly, and make no mention of the pupil's consent;

whereas those granted to the pupil are taken to him directly, and make no mention of the tutor's consent. (Ersk. i. 7. 14; Kennedy v. Innes, June 6, 1823.)

348. We have borrowed from the Roman law (Inst. i. 21, and Dig. ii. 14. 28, 26. 8. 9) one exception to the rule that deeds granted or contracts entered into by a pupil are null, viz. where they are beneficial to himself. The principle of this exception is, that in order to deter those who might impose on the weakness of pupils, the law favours them by granting to them the power of making their condition better, whilst it prevents them from making it worse. (Ersk. i. 7. 33.) The same principle is applied to transactions with married women. (Sec. 51.)

349. When a pupil sues, the proper mode is for the tutor to raise the action in his tutorial capacity, and to conclude for payment to himself. (Shand's Practice, p. 140; M'Neil v. M'Neil, M. 16384; Keiths v. Archer, Nov. 24, 1836.)

350. A pupil will be entitled to institute an action himself, if his tutor be the defender or have an adverse interest. In this case, a tutor *ad litem* will be appointed to the pupil when the case comes into Court. (Shand, *ut supra*.) The opposite party is entitled to ask for the appointment of a legal guardian to the pupil, as otherwise decree, though obtained against him, would not be effectual. (Ib. 142; Calderhead v. Calderhead, May 26, 1832.)

351. An unborn child has many legal rights, and a tutor may consequently be appointed to him for their protection. (Fraser, 162; Murray v. Marshall, M. 16226.)

352. The father is both tutor and curator to his children, under the name of administrator-in-law. He requires no judicial proceeding to invest him with these offices (Stair, i. 5. 12; Ersk. i. 6. 55), even where the child has separate property; and it is thought that he is not incapacitated by the fact of his being himself a minor. (Fraser, 164; Bruce, Tutor's Guide, p. 43.)

353. Neither paternal nor maternal grandfathers can exercise either office without special appointment (Stair, i. 6. 6 ; Ersk. 6. 55) ; and the mother is in the same position. (Stair, *ut supra* Ersk. i. 7. 2.)

354. The father of a bastard is not his administrator-in-law (Ersk. i. 6. 55 ; *Wilson v. Campbell*, March 10, 1819, F. C. but a father who is himself a bastard, is so to his own lawful children. (*Muir v. Kincaid*, M. 1349 and 16250.)

355. If property be gifted to a child by a third party, as trustees appointed by the donor to manage it, they will be entitled to do so to the exclusion of the father. Their powers, however, are confined exclusively to the management of the fund. (Ersk. i. 6. 54, and i. 7. 2.)

356. Religious opinions now form no ground of disqualification for the office of tutor, unless they involve practices which are grossly immoral. (10 Geo. iv. c. 7, sec. 10.) An outlaw cannot be a tutor or curator. Aliens cannot be appointed, but the law recognises their paternal authority. (Fraser, 169.) But a party not resident within Scotland has been allowed by the Court to act as curator, as the nominee of the minor ; but he had to find caution that he would answer in the Scotch court in all matters relating to the duties of his office. (*L. Macdonald* 1864, 2 M. 1194.) In a subsequent case the Court refused to appoint a curator resident in England who was ready to find caution in Scotland to the amount required, on the ground that the sufficient peculiarity of circumstances, as in *Macdonald's case* had not been shown to warrant a departure from the general rule. (Fergusson, 1870, 8 M. 426.)

357. *Testamentary tutors, tutors testamentar* as they are called in Scotland, or tutors nominate, can be nominated by the father alone. Neither the mother, the grandfather, nor any other ascendant, has this power, even after the father's death. If appointments be made by these persons, they may be reduced, as in fraud and prejudice of the tutor-at-law, and

failing him of the Crown. (Stair, i. 6. 6; Ersk. i. 6. 55, and i. 7. 2.)

358. Testamentary tutors may be either male or female, provided the latter be not married. (Ersk. i. 7. 12; Johnston v. Johnston, M. 16222.) They must be twenty-one years of age.

359. A father cannot nominate tutors to his bastard children; but he may leave property to them, under the condition that it shall be managed by a party appointed, and that the children's custody and education shall be as he may direct. The manager so appointed is not a tutor, but a factor or trustee. (Ersk. i. 7. 2 *et seq.*; Bell's Prin. 2071; Johnston v. Clark, M. 16374.)

360. Tutors are generally appointed in the last will and testament of the father, but the nomination will be effectual by any deed or writing which sufficiently indicates his will. (Stair, i. 6. 6; Ersk. i. 7. 2.) Tutors must be nominated, or at least individually pointed out, by the father; thus he cannot appoint as tutors, along with those nominated, others to be assumed by them as trustees: the power to appoint cannot be delegated. (Walker, 1874, 2 R. 120.)

361. Though the word "governors" be used for "tutors," the effect will be the same (Nimmo v. Robertson, M. 16239); and the interpretation clause of the recent Act relative to the resignation, power, and liabilities of gratuitous trustees (24 and 25 Vict. c. 84, sec. 3), so defines a "gratuitous trustee" as that it would almost seem to include tutors under it.

362. Several tutors may be appointed, and in this case a certain number is usually specified to be a quorum.

363. The father being presumed to have satisfied himself of the personal honour and the sufficiency of the fortunes of those whom he selects as tutors to his children, they require no service or other judicial proceeding prior to entrance on the office. (Stair, *ut supra*; Dishington v. Hamilton, M. 16227.)

364. They are not obliged to take the oath *de fidei*, or to find caution, unless when insolvent, or where clamant suspicions

of their honesty exist. In these cases, the Court of Session, on application by any relative of the pupil, will ordain them to find security. (Stair, *ut supra* ; Ersk. i. 7. 3 ; Fraser, 180.) They must even in this case find caution, unless they are appointed by the father in *liege poustie*.

365. No dispensation from the father even can free them from the duty of making up tutorial inventories, and until this is done they have no legal power to act. (Bell's Prin. 2081 ; Fraser, 181 ; Stat. 1763, c. 2 ; *infra*, sec. 351 *et seq.*) The penalty for not making up such inventories is, that they cannot claim any of the exemptions from liability allowed (see next section) to those tutors who are named by the father, and they may be removed as suspect, without any allowance for sums disbursed by them in the pupil's affairs. (Ersk. Pr. i. 7. 8.)

366. At common law, tutors are liable for omissions as well as intromissions, and *singuli in solidum*, or each for the whole loss incurred by the trust ; but this "having frightened many from accepting the office, and thereby several pupils being left destitute," it was enacted by the Stat. 1696, c. 8, that the father might nominate tutors with the qualification, "that they shall not be liable for omissions, but only for their actual intromissions with the means and estate descending from the father, and that each of them shall only be liable for himself, and not *in solidum* for others." By the Act 24 and 25 Vict. c. 84, the Legislature has taken a further step in the same direction, by providing (sec. 1) that all trusts constituted by deed under which gratuitous trustees are nominated, unless the contrary be expressed, shall be held to include a provision to the effect, that "each trustee shall only be liable for his own acts and intromissions, and shall not be liable for the acts and intromissions of his co-trustees, and shall not be liable for omissions."

367. A *factor* may be appointed by the father, along with the tutors, to act under their direction ; and when so appointed,

he cannot be removed by them without just cause. (*Fulton v. M'Allister*, Feb. 15, 1831.)

368. A *tutor-at-law* is so named because he takes the office by the disposition of the law itself, in case testamentary tutors have either not been appointed, have declined to accept, failed after acceptance, or become incapacitated to accept or to act.

369. The tutor-at-law is the nearest male *agnate* to the pupil, —i.e. his nearest kinsman by the father's side. (*Stair*, i. 6. 8; *Ersk* i. 7. 4.) No female can be a tutor-at-law.

370. A bastard can have no tutor-at-law, because he has in law no father, and consequently no relative on the father's side. (*A. v. B.*, M. 16219.)

371. A tutor-at-law must be twenty-five years of age, the period of majority by the Roman law. (*Stat.* 1474, c. 51; *Inst.* L i. tit. 23; *Dig.* iv. tit. 4.) As to custody of pupil's person, see *infra*, sec. 372 *et seq.*

372. The tutor-at-law must be formally vested in the office by a service, or legal proceeding in which the grounds of his claim are proved to the satisfaction of a jury of fifteen men.

373. This proceeding may be brought under review of the Supreme Court. (*Miller v. Sawers*, June 5, 1841; *Godwin v. Sawers*, June 24, 1842.)

374. A *tutor dative* is appointed where there are neither tutors testamentar nor tutors-at-law.

375. Guardians of this class have always been nominated by the Crown, latterly through the medium of the Court of Exchequer, now the Court of Session. (19 and 20 Vict. c. 56.) See *infra*, Court of Exchequer.

376. The Court usually prefer to appoint those to whom the father or other relatives have shown a predilection. Such are testamentary tutors whose nomination has fallen by the failure of a quorum or a *sine quo non*. (*Stair*, i. 6. 11.)

377. The law of Scotland differs from the law of Rome, in placing it entirely within the option of the tutor to accept or

decline the office. (Stair, i. 6. 11.) As to the tutor's power of resigning the office, see *infra*, sec. 416.

378. Tutors-at-law and tutors dative must find caution for — their intromissions.

379. *Tutorial inventories* are appointed to be made by the statute 1672, c. 2, the chief provisions of which were borrowed from the Roman law.

380. The two next of kin of the pupil, both on the father's and mother's side, major and resident within Great Britain for the time, must be made parties to the transaction, and the inventory must be subscribed by them, and by the tutors or curators. Where the two next of kin on either side, being majors, are resident abroad, the practice is to present a petition to the Court (Inner House) to dispense with their citation ; and on this being granted, and the necessary authority produced to the Lord Ordinary, the matter proceeds as if they had been cited.

381. When the nearest of kin refuse to appear or to concur, the inventory will be made up at the sight of the Judge Ordinary, or of a delegate appointed by him.

382. The inventory so made up will be as effectual as if the nearest of kin had appeared and concurred.

383. The inventory must contain a description of the whole heritable and moveable estate of the pupils.

384. An inventory must be prepared in every case, even where the pupil has but one possession. By the Pupils Protection Act (12 and 13 Vict. c. 31, sec. 3, 25), all judicial factors, and persons served tutors-at-law or appointed tutors dative to pupils, are required, within six months, to lodge with the Accountant of Court a distinct rental of the lands, and an inventory of the moveables entrusted to their charge. They must also close their accounts once in every year, on a day fixed by the Accountant, and lodge an account with him within a month of that day. (Sec. 4.)

385. Tutors testamentar, equally with tutors-at-law, and tutors dative, are bound to make up inventories; but they are not under the provisions of the Pupils Protection Act.

386. Fathers alone are not bound to do so.

387. The debtors of the pupil are not bound to pay to the tutors, unless they can show that the sums demanded are contained in the inventories, or eiks (additions), made up in terms of law. (Fraser, 197 *et seq.*)

388. The custody of the child belongs to the father during life as its natural guardian; and should he have nominated any one to take charge of it after his death, this nominee will be preferred even to the mother, unless the child be in infancy. (A. v. B., M. 16224; Forbes v. Caithness, M. 16241.)

389. Failing the father's appointment, the mother is entitled to the custody.

390. As a general rule, she will lose the custody if she enter into a second marriage; and the pupil will be delivered to the tutor, or next cognate. (Fraser, 215.)

391. The person of the pupil will not be entrusted to a tutor who is his heir, because his interests are adverse to the pupil's life. (Stair, i. 6. 15.) Such an arrangement has been described as "*Agnum lupo committere ad devorandum.*" (Co. Litt. Judl. 88; Blackstone, i. c. 17.) The tutor will be debarred even though he be heir only in part of the pupil's estate. It is for this reason that, failing the mother, the nearest cognate, or relative on the mother's side, is chosen, and that the nearest agnate is deprived of the custody of the pupil's person, even where he is his tutor-at-law. (Ersk. i. 7. 4; Higgins, June 7, 1821, F. C.; Bell's Prin. 2076.) But if the nearest cognate be a man of loose and dissolute habits, if he has shown personal enmity to the pupil, or if there be any other objection which seems sufficient, the Court will not trust him with the custody. (Dishington v. Hamilton, M. 16227.)

392. It belongs to the Court of Session, as the supreme court

of equity, to regulate the custody of pupils ; though an application to a Sheriff for that purpose does not seem to be incompetent. (*Lang v. Lang*, June 30, 1849.) In the case of the custody of illegitimate children, applications to the Sheriff are of common occurrence in Edinburgh. (See sec. 336.)

393. *The education* of the pupil is properly entrusted to the tutors ; and while the Court will, as much as is consistent with his advantage, give the custody of his person to the mother, they have often interfered at the instance of the tutors, and directed that the child be placed at their disposal, in order to its proper education.

394. They have held the tutor, though not entitled to the custody, entitled to direct the education of the child, and superintend it. In several cases they have constituted themselves judges of the conflicting statements of parties, and decided for the mother or the tutor, according as they preferred the mode of education that either proposed. (*Fisher v. Sarm*, Dec. 21, 1827 ; *Campbell v. Campbell*, March 7, 1833.)

395. "Where the father has chalked out a course of education for the child, his injunctions will be obeyed, unless they are immoral or irreligious." (*Fraser*, 223.)

396. The tutor is not entitled, in his management of the pupil's affairs, to *alter the succession* to his property—as, for example, to change a bond destined to executors into a bond secluding them. (*Ersk. i. 7. 8.*) This rule applies even to the father acting as administrator-at-law. (*Morton v. Young*, Feb. 11, 1813.)

397. It often happens, in the management of the pupil's property, that its nature of heritable and moveable is altered without any intention on the part of the tutor of affecting the succession.

398. It is generally agreed that the tutor's acts do not change the succession, though the nature of the subject be altered from heritable to moveable, or the reverse. In all cases, on the con-

trary, where the result happens by the operation of a public law, or the diligence of creditors, or any other cause over which the tutor has no control, the succession will be regulated by the legal character of the property in the state in which these changes have left it. (Fraser, 260 *et seq.*; Bell's Com. ii. 847.)

399. The tutor is not at liberty to speculate with the funds of his pupil, however tempting the venture may be, or however insignificant the apparent risk. (Bankt. i. 7. 36; Fraser, 266.) If the tutor use the pupil's funds for purposes of speculation, and make profit, he is bound to hand it, and not merely the interest, to the pupil; and, on the other hand, if there be loss, he must make it good.

400. If the father was a merchant or manufacturer, having large works which cannot be immediately disposed of, the tutor is entitled to exercise his own discretion as to the best mode of securing the property of his pupil from risk, keeping in view the rule, that his first duty is to preserve it, not to increase it. (Plumber *v.* Tutors, M. 16358; Philip, Nov. 22, 1827; McFarlane *v.* Burgess, May 27, 1828; Graham *v.* Hopeton, M. 5599; Stair, i. 6. 18; Ersk. i. 7. 24; Fraser, *ut sup.*)

401. A *factor* may be appointed by the tutor to assist him in managing the affairs of his ward. (Ersk. i. 7. 16.) Unless in cases of misfortune, which could not have been anticipated, the tutor will be liable for the transactions of the factor. (Stair, i. 6. 13; Home *v.* Pringle, Nov. 30, 1837, affirmed Jan. 22, 1841.)

402. The salary of the factor must be moderate, as the tutor will not be allowed to take credit for the excess in accounting with the pupil. (Graham *v.* Hopeton, M. 5599.)

403. If a tutor is himself factor, the Court will not allow a salary unless there be a clause in the deed by which the tutor or tutors were appointed, authorizing them to appoint one of themselves to the office. (Home *v.* Pringle, June 22, 1841, Rob. App. Cas.)

404. The tutor cannot lend to his pupil or borrow from him even on heritable security, nor can he do any deed by which either he himself or his own relatives may be benefited. The rules, however, will be understood in a reasonable sense (*Elphinstone v. Robertson*, May 28, 1814.)

405. A tutor testamentar is not liable for so high a degree of diligence as a tutor-of-law or a tutor dative, because he did not seek the office, whereas they did.

406. In the former case, the amount of diligence which the tutor devotes to his own affairs will be sufficient; in the latter the amount of diligence which a *prudent* man (*providens pater familias*) employs in the management of his affairs will be incumbent. (*Stair*, i. 6. 21, with More's note; *Ersk.* i. 7. 26.)

407. Fathers will be liable only for gross and glaring negligence (*crassa negligentia*). (*Stair*, i. 5. 12; *Ersk. ut sup.*)

408. The liabilities of a tutor who has once accepted will not be diminished though he has lain by altogether, and allowed the other tutors to manage, or mismanage, the estate. To plead that he has not acted is to plead neglect of duty. (*Ersk.* i. 7. 27; *Murray v. Murray*, May 30, 1833; *Kennedy v. Wightman*, June 28, 1827.)

409. Amongst themselves, tutors are liable according to the actual intromissions. (*Fraser*, 305.)

410. All tutors, except tutors testamentar, are now placed under the superintendence of the Accountant of the Court of Session, appointed by the Pupils Protection Act (12 and 13 Vict. c. 51), and their accounts are audited according to the provisions of that statute. (See its provisions under *Factors loco tutoris*, *infra*.)

411. *Tutary may terminate* from any one of the following causes.

412. (1.) The pupil's arrival at puberty.—This rule holds with regard to each pupil successively, though there may be several of different ages, who consequently cannot attain

puberty at the same time. The father cannot prolong the term of pupillarity. (Stair, i. 6. 24 ; Ersk. i. 7. 29.)

413. (2.) The death of the tutor or pupil.—Death, in this case, includes civil as well as natural death. On the tutor's death, his heir is not entitled to the office merely in consequence of his being heir ; and the proper course is, for the nearest agnate to serve tutor-at-law, or for the next of kin to obtain the appointment of a tutor dative or a factor *loco tutoris*. (Stair et Ersk. *sup.* ; Fraser, 308.)

414. (3.) The marriage of a female tutor voids the office.—“This is a rule which no provision of the testator can dispense with.” (Stair, i. 6. 23 ; Fraser, *ib.*)

415. (4.) If the tutor has been appointed conditionally, the office will become vacant on the occurrence of the contingency named in the deed of appointment.—Under this head come the very common cases of a number of tutors being appointed jointly, and of a quorum, or *sine quo non*, being named. If any one in the first or second case, or the *sine quo non* in the third, fail, the whole nomination is at an end. When tutors testamentar have been appointed without any express statement of their being joint, the nomination does not fall by the death of one, or even of the majority of the whole. A different rule holds as to tutors dative. By the death of one, the whole nomination fails, unless there be some declaration to the contrary. (Stewart v. Baikie, Jan. 28, 1828 ; Stewart v. Scott, Feb. 29, 1832, reversed by H. of L. 7 W. and S. 211 ; Fraser, 309.)

416. (5.) Resignation of the office.—A tutor is not entitled to resign after he has entered on the management of the estate. (Stewart v. Dunkeld, M. 16248.) The consent of his co-tutors would not validate the resignation of one of them. (Logan v. Meiklejohn, May 26, 1843.) But though tutors cannot free themselves from the responsibilities of the office at their own hands, seeing that many cases occur where their continuance in office would be prejudicial to the ward, the practice has been

introduced of applying to the Court for liberty to resign. Infirm health has been sustained as a sufficient ground for resigning. (Munnoch, July 7, 1837.) It had been decided (Gilmour's Trustees, Feb. 7, 1852) that a clause in a family trust deed empowering trustees to resign is effectual ; and it is now provided by 24 and 25 Vict. c. 84, that this power shall belong to "gratuitous trustees" under any deed which does not contain a clause expressly taking it away. It is very doubtful whether this would include a tutor. It has not yet been decided whether a clause conferring power to resign on a tutor is effectual.

417. (6.) Removal as Suspect.—Although guardians are not, as they were by Roman law, considered public officers, the law of Scotland has so far retained the principles of that system, as to hold them amenable to the Court of Session as the supreme court of equity. It is not necessary, in order to warrant his removal, that the conduct of the tutor shall have been dishonest ; it is enough if, through incapacity, bad health, or negligence, he do not perform the duties which his office imposes on him. (See rule stated in Bruce's Tutor's Guide, p. 296 ; Stair, i. 6. 26 ; Ersk. i. 7. 29.)

418. Incapacity may be moral, as well as intellectual or physical ; and female tutors who have had bastard children, or are otherwise proved to have been guilty of fornication, have been removed. (Wood v. Monypenny, M. 16226.)

419. The ground of removal which most frequently occurs in practice, is failure to make up tutorial inventories. (*Ante*, sec. 379 *et seq.*)

420. The action of removal may be raised by the pupil himself, authorized by a tutor *ad litem*, and is competent also to a co-tutor or to any of the pupil's relations. But persons unconnected with the pupil have not, as in the Roman law, a right to interfere. A judge may also, *ex proprio motu*, remove a tutor who, in the course of an action, has been incidentally proved guilty of acts rendering him suspect. (Fraser, 315.)

421. All tutors may be removed, even fathers. On the removal of the tutor, the Court will appoint a factor *loco tutoris*, if none having a better title claim the office. (Johnstone v. Wilson, July 11, 1822 ; Wotherspoon, M. 16372.)

422. *An action of count and reckoning* (*actio directa tutelæ*) is competent if the tutor neglects to account at the termination of the tutory, not only to the ward, but to his heir and his creditors, and not only against the tutor, but against his heir. (Ersk. i. 7. 186.)

423. Where the balance is in favour of the tutor, a corresponding action of accounting (*actio contraria tutelæ*) may be instituted by him. (Ersk. i. 7. 187.)

424. The office of tutor is entirely *gratuitous*, being supposed to be discharged not from mercenary motives, but from kindly feelings of relationship or affection. The rule, particularly if the principle of the recent Act relative to the resignation, powers, and liabilities of gratuitous trustees (24 and 25 Vict. c. 84, *supra*) should either be found judicially to apply, or should be extended by legislation to tutors, need scarcely ever be attended with hardship, as tutors may appoint factors with salaries, who will manage the whole affairs of the trust, leaving nothing for the tutors to do but to examine their accounts.

425. The action of accounting, whether by pupil against tutor, or tutor against pupil, prescribes, if not raised within ten years after the termination of the office. The statute by which this limitation was introduced (1696, c. 9) also provides, That it shall not run against minors ; that is to say, that the ten years are counted from the majority.

## II. CURATORY.

426. The distinction between tutory and curatory, and the different objects of the latter, have been already pointed out in treating of guardianship in general. (*Ante*, p. 78.)

427. Minors are regarded by the law of Scotland as having sufficient capacity for the ordinary business of life, but not as possessing that matured understanding and experience necessary to render their deeds unchallengeable under all circumstances. To supply this deficiency is the object of curatory.

428. As a general rule, a minor without curators may competently perform all the acts which are competent to one who is major, under the qualification, that if the minor can prove lesion within four years (the quadriennium utile of the Romans), the acts done by him will be set aside. In such circumstances, if one, of course, is willing to contract with him; and hence the necessity for appointing a curator to give validity to his deed (Stair, i. 6. 32; Ersk. i. 7. 33.)

429. A deed by a minor having curators, without their consent, is in general null, except so far as he is benefited thereby (Fraser, 335 *et seq.*)

430. A minor may test on his moveable property, however valuable; and he may sell his heritage, or otherwise dispose of it, for onerous causes, subject to the condition already mentioned; but he cannot gratuitously convey it to any other but his heir-at-law, and to him only *mortis causa*. (Fraser, P. art. C. 340.) A minor's incapacity to convey heritage *mortis causa* does not extend to that which is merely heritable by destination (Brand, 1874, 2 R. 258.)

431. A minor cannot hold a public office, or even such quasi-public offices as trustee on a sequestrated estate (Threshie, Me. 30, 1815, F. C.), because it would be incongruous to allow him irrevocably to bind the creditors of the bankrupt; whereas, if he had been dealing with his own affairs, he could have claimed restitution on the ground of minority and lesion. (Fraser, 342)

432. He cannot be a juror or a commissioner of supply; but it has been held, with some difference of opinion, that he may be a sheriff-clerk substitute. (Heddell v. Duncan, June 1810.)

433. Persons competent to be tutors (*ante*, p. 85) may be curators, and those who are ineligible to the former office are also ineligible to the latter.

434. Curators are appointed in four ways :

435. (1.) *Ipso jure*, i.e. *by the action of the law itself*.—It is in this way that the father is curator as well as tutor to his children ; and he consequently requires no judicial proceeding, or other form of appointment, to vest him with the office. (Stair, i. 5. 12, and i. 6. 35 ; Ersk. i. 6. 54.)

436. The minor cannot choose curators for himself during his father's lifetime, even where he is possessed of separate property. But the father may resign this right, and allow the minor to choose other curators ; and if the minor have an interest in a lawsuit adverse to his father's, a curator *ad litem* will be appointed. (Stair, i. 5. 12 ; Ersk. i. 6. 54.)

437. Where property has been left under the express condition that the father shall not have the administration of it, the minor may choose curators. (Ib.)

438. The grandfather is not curator *ex lege*. (Stair, i. 6. 6 ; Ersk. i. 6. 55 ; Harpers, M. 16262.)

439. Bastards are not under the curatorial power of their natural father, nor can he appoint them curators. They may choose curators during his life, and against his will. (*Wilson v. Campbell*, March 10, 1819, F. C. ; Ersk. i. 6. 55 ; Fraser, 122 and 348.)

440. As the husband, in all cases, becomes by marriage the guardian of his wife, and the curatory of her father and all others over a female minor ceases on marriage, a husband does not require to find caution, or to make up inventories. (*A. v. B.*, M. 8929 ; Ersk. i. 7. 29.)

441. (2.) *By testament*.—The common law of Scotland, following what to a certain extent was that of Rome, denied to fathers the power of appointing testamentary curators. This was altered by the statute 1696, c. 8, which conferred on

fathers the right of nominating curators to their children, whom the latter are compelled to accept, at least with reference to an estate descending from the father himself. (Ersk. i. 7. 11; Fraser, 351.)

442. The rules for their appointment are the same as in the case of tutors. (*Ante*, p. 82.)

443. They are not bound to find caution, but they may be removed as suspect by the Court, on the application of any near relative of the minor. (Bell's Dict. v. Curator.)

444. (3.) *By choice of the minor.*—The form of appointment of this class of curators was regulated by express statute so early as 1555, c. 35. The proceeding may take place either before the Sheriff Court of the county or the Court of Session. Two of the most "honest and famous" of the minor's kin, both on the father's and mother's side, must be cited to appear in Court, to hear and see curators given to the minor. (Ersk. i. 7. 11; Fraser, 354.) Nomination of curators by the father bars choice by the minor. (Pitcairn, M. 16339; Fraser, *ut sup.*)

445. Where the children are bastards, they have no legal kin; but the Court will hold those on the mother's side to be so for this purpose. (A. B., June 23, 1838; Fraser, 354 *et seq.*)

446. If there are no kin in point of fact, the Court will still nominate curators, dispensing with citation of kin. (Fraser, *ib.*)

447. (4.) *By the Court of Session.*—The appointment of curators to manage particular actions is of everyday occurrence; and, if not applied for by the opposite party, will commonly be made by the judge of his own accord.

448. Curators of all kinds are entirely at liberty either to accept or decline office. (Stair, i. 6. 30; Ersk. i. 7. 20.)

449. Curators are bound to make up inventories of the minor's estate in the same manner and under the same penalties as tutors. (*Ante*, p. 86.)

450. As already explained in the general remarks on Guardianship, the duties of the curator differ essentially from those

of the tutor. Those of the curator consist in giving the minor counsel for the guidance of his own acts, and validating them by his consent; those of the tutor, in acting for him.

451. But the powers and duties of all curators are alike. Fathers, testamentary curators, and those chosen by the minor himself, possess the same authority, with this explanation, that the powers of the two latter classes may be modified by the deed of nomination. (Stair, i. 6. 35; Ersk. i. 7. 15; *Foster v. Foster*, M. 16238.)

452. The curator has no power over the *person* of the minor. He may marry (Ersk. i. 7. 33), go abroad, and fix his domicile where he pleases, and no guardian or Court can restrain him. This was held to be law in the case of a girl who was only twelve years and five days old, and has reference to fathers as well as other curators. It has been made a question by our older writers, whether the father, apart from his curatorial character, has any control over the person of his minor children corresponding to the Roman *patria potestas*. (Dirleton's Doubts, p. 112.) Professor More, in his Notes to Stair (xxxi.), says: "When it is kept in view that by the law of Scotland marriage may be contracted immediately after pupillarity, and a separate family thus established; and further, that minors, though unmarried, are entitled (as against curators) to choose their own place of residence,—it seems difficult to maintain that children, after pupillarity, who choose to leave their father's house and to live elsewhere, can by law be restrained from doing so." He adds, that "undoubtedly they cannot claim to be alimented by their father except in family." (Stair, i. 5. 13; Ersk. i. 6. 55; Ersk. Prin. i. 7. 36; Bank. i. 6. 1, p. 153; Fraser, ii. p. 27; *Marshall v. Macdougall*, M. 8930; *Graham v. Graham*, M. 8934.)

453. It is the duty of the curator to advise the minor as to his education; but he has no power to go beyond advice. (*Marshall v. Macdougall*, M. 8930; Fraser, 364; Chambers on Infancy, p. 116.)

454. It is the duty of the curator to advise the minor as to his future occupation in life, and he will be justified in allowing him to invest his means in such a way as to form a stock-in-trade. (*Duncanson v. Duncanson*, M. 8928; Ersk. i. 7. 21 and 24.)

455. When the minor and his curator differ in opinion, the Court will not compel either to yield to the other; but they will free the curator from his office, on an application by him to that effect, and appoint another in his stead; or, if the application should proceed from the minor, they will remove the curator, if they are of opinion that his refusal to consent to the acts of the minor has been unreasonable. (*Drumore*, M. 16349; *Elch. v. Minor*, 10, 5 Sup. 737; *Bell's Prin.* 2096; *Fraser*, 369 *et seq.*)

456. There are many cases in which, though the curator does not act, he will be responsible for the damage which may result from not acting (*Fraser*, 369); and, in such circumstances, his only safe course is to resign his office with the consent of the Court. If the Trustees Act (24 and 25 Vict. c. 84) apply to curators, which it probably does not, it will both diminish their responsibilities and facilitate their resignation. (*Ante*, secs. 366 and 424.)

457. The diligence incumbent on curators is the same as that required of tutors. (*Supra*, secs. 405-408; *Fraser*, 372.)

458. The modes in which curatory terminates, correspond in general to those already explained relative to tutory. (*Ib. ib.*)

459. Curators may be removed as suspect, in like manner as tutors; for the same reasons and in the same mode. (*Ante*, p. 92; *Stair*, i. 6. 36; Ersk. i. 7. 29.)

460. Curatory, like tutory, is gratuitous. (Ersk. i. 7. 15; *Scott v. Strachan*, M. 13433.)

461. The period from which the curator's accounting must commence is the date of his acceptance of office. If he has not intermeddled with the estate, he ought to have done so. (Ersk. i. 7. 20.)

462. No minor, even with the consent of his curator, can

he succession to his heritable estate by a gratuitous deed he cannot convert heritable estate into moveable estate; he may do the reverse. (Ersk. i. 7. 18 and i. 7. 33; 340.) But he may sell his heritage without the inter-  
 of a judge (Ersk. i. 7. 33); and even without consent  
 curator he may execute a testament, bequeathing his  
 le property according to his pleasure. (Ersk. i. 6. 36;  
 c. 430.)

In order that a minor may be freed from a deed which  
 executed without the consent of his curator, it is sufficient  
 establish the facts of minority and lesion. Whether  
 as or was not fraud on the side of the other party, is  
 quired into. Proof of personal ability or professional  
 dge on the minor's part will not bar the plea. (Dundas  
 , M. 9034; Fraser, 390.) The minor's heirs, creditors, or  
 as may claim restitution. (Stair, i. 6. 44; Ersk. i. 7. 42.)

Marriage contracts may be set aside by minors on the  
 f lesion (Stair, i. 6. 44; Ersk. i. 7. 38), though the  
 e itself cannot be reduced.

For the sake of the minor himself, the law refuses  
 ion in the payment of ordinary debts, rents, dividends,  
 a, and the like, whether made to a tutor or a minor, unless  
 he debtor acts fraudulently. (Ersk. i. 7. 36; Fraser, 410.)

In order to enable minors to obtain a livelihood, the  
 this respect is considerably modified, when they are  
 l in trade or professional pursuits. (Stair, i. 6. 44;  
 7. 38; Fraser, 411.)

There is no restitution to a minor who, by passing him-  
 as major, has fraudulently induced another to contract  
 im. (Code, ii. 43. 2; Dougall v. Marshall, M. 8995;  
 6. 44; Ersk. i. 7. 36.)

Where two minors contract, if no fraud be proved,  
 ion will take place only to the extent to which the gainer  
 fited by the transaction. If there has been no gain, the

contract is irreducible unless on the ground of fraud. (Ersk. i. 7. 40; Fraser, 429.)

469. The law of Scotland, following that of Rome, has fixed *four years* as the period within which the minor must avail himself of the privilege of getting himself restored against deeds to his hurt. (Stair, i. 6. 32; Ersk. i. 7. 33; Fraser, 423.)

470. This rule applies to deeds which are voidable, and not to those which are void and null—such, for example, as a deed by a pupil. Here the ground of reduction is not a privilege competent only to minors, but a right to reduce a deed which has never been validly executed, and which, of course, belongs to every one. (Fraser, 424.)

471. It is a very old rule in the law of Scotland, that the minor is not bound to plead in any suit brought against him for the purpose of depriving him of his paternal heritage. (As to the origin and effects of this rule, see Fraser, 439.)

### III. PRO-TUTORS AND PRO-CURATORS.

472. These are persons who, without any title to the office of tutor or curator, act as if they were legally appointed to these offices.

473. Though the motives of persons acting in this capacity may be excellent, they are not favourites of the law. Their administration may be honest; but they have not given the guarantees for its honesty which the law, by exacting caution and enforcing the preparation of inventories, demands from ordinary tutors and curators. It is for this reason that, though they have none of the powers of tutors and curators, they are liable as if they had them. If a debt is lost in consequence of their neglecting to raise an action, they are bound to pay it, though, if they had instituted the action, it would have been a valid defence to the debtor that they had no title to sue. If they neglect to lend out the minor's money, they are liable in

interest. In short, if they fail to use the same diligence that an ordinary tutor or curator is bound to use, according to the rules already stated, they are liable for all loss and damage which their negligence may have caused. (Ersk. i. 7. 28; Fraser, 452 *et seq.*)

474. Pro-tutors or pro-curators may be called upon at any time by the minor to account and resign their office. (Fraser, 454.)

475. In this accounting they are entitled to credit for all sums disbursed profitably on the minor's account. (Ersk. i. 7. 8; Fraser, *ut sup.*)

#### IV. FACTORS LOCO TUTORIS, AND CURATORS BONIS.

476. The formalities necessary to the constitution of the offices of tutory and curatory are of such a nature, as frequently to form obstacles to the appointment of the only parties qualified for these duties; and the rule which prohibits any charge being made by tutors or curators for their services, however burdensome and long continued, very frequently deters those who have been nominated from incurring the responsibilities of a guardianship that may extend over a long period of years. If the person appointed in this manner be also the tutor-at-law, he will, in general, be entitled to receive the usual remuneration for his services. Hence there are many cases in which those who are most in need of protection would be deprived of it altogether, were it not for the appointment, by the Court of Session, of officers who are induced to labour by receiving remuneration for their services. The extent to which this sort of guardianship has superseded that by private appointment may be gathered from the fact that, in 1834, the Lord President stated in a case (William Bell's Petition, March 7, 1834), that judicial factors had then under their management property to the value of eight millions.

477. It was for the regulation of the duties and responsi-

bilities of this class of officers more especially that the "Act for the better protection of the property of pupils, absent persons, and persons under mental incapacity," was passed in 1849; though its provisions are also applicable to tutors-at-law, tutors dative, and to persons served as curators or appointed tutors dative to insane persons and idiots. (12 and 13 Vict. c. 51, sec. 1.)

478. Judicial factors, for the most part, are professional persons; but it is not necessary that such should be the case.

479. Females are not absolutely ineligible; but it was found that so many litigations arose from their mismanagement, that the Court has latterly declined to appoint them, whether married or single. (*Horn v. Duncanson*, March 6, 1845; *Fraser*, March 6, 1843, *Jurist*.)

480. It was formerly the rule that a minister of the Established Church should not be appointed, as his duties were considered incompatible with the proper discharge of the office (*Thomson*, Nov. 13, 1829; *M'Culloch*, June 22, 1832); but the minister of a dissenting congregation was eligible, as the Court was not supposed to know anything of his ecclesiastical character. (*Hall*, Feb. 18, 1830.) Recently ministers of the Establishment have been appointed.

481. In general, only one person will be nominated. (*Pettigrew*, Feb. 21, 1839; *Sloan*, Dec. 18, 1844, *Jurist*; but see *Kirk*, May 21, 1835.)

482. Where there is a competition between two parties for the office, the Court will usually pass them both over, and remit to the Sheriff or to the Clerk of Court to suggest a neutral person. (*Robertson*, July 11, 1840.) Where it seems more expedient, the Court will itself appoint without any remit. (*Cowan*, June 13, 1845.)

483. A bankrupt will not be appointed if any one having interest object (*Dixon*, Jan. 20, 1832); and a step-father is considered a bad guardian. (*Buchanan*, Feb. 4, 1832.)

484. The appointment is made by one of the nearest of kin of the incapacitated person (in the case of a pupil, generally the mother) presenting a summary petition to the Junior Lord Ordinary of the Court of Session, setting forth the state of his affairs, the want of a person legally authorized to manage the estate, and suggesting some one for the office. The petition is ordered by the Lord Ordinary to be published and intimated to the nearest of kin on the father's and mother's side. (Fraser, 464.) Although the petition invariably is disposed of by the Junior Lord Ordinary, it must be printed and boxed to the Court, the Lord Ordinary dealing with it merely as if it were remitted to him from one of the divisions of the Inner House. [Where the estate of the incapacitated person does not exceed one hundred pounds in yearly value, a judicial factor may now be appointed by the Sheriff or Sheriff-Substitute on an application by petition in the ordinary form. The yearly value is to be computed, as to heritage, by the rent as entered in the valuation roll; as to moveables, by the yearly interest on the estimated value at four per cent. (43 and 44 Vict. c. 4).]

485. If the pupil or fatuous person be illegitimate, and consequently without legal next of kin, the Court will dispense with any intimation beyond that on the walls of the Court and in the Minute-Book. (Young, Feb. 19, 1818, F. C.; Wood, May 31, 1834.) The petition may, in such case, be at the instance of any person having an interest in the disposal of the property. In one case, the trustee on a bankrupt estate got a factor *loco absentis* appointed to make a claim for a dividend which had been declared on the sequestrated estate in which he was trustee. (Peter Budge, June 1868, *unreported*.)

486. The name of the party suggested must be given in the petition, as this is one of the things to be intimated. (Buchanan, Feb. 27, 1833, Jurist.)

487. Where there is urgent necessity for an immediate appointment, the Court will appoint the person suggested to be

*interim factor* (Kirk, March 10, 1827 ; A. B., Nov. 20, 1829) ; or during vacation the Lord Ordinary will appoint him till the meeting of the Court. (Baigrie, Nov. 14, 1838 ; Scott, May 22, 1845. As to the practice of the Court, see Fraser, *ut sup.*)

488. The following are the leading provisions of the Pupils Protection Act (12 and 13 Vict. c. 51 ; July 28, 1849), already referred to, in so far as they affect judicial factors :—

489. (1.) The judicial factor must find caution for duly performing his duties.

490. (2.) He shall lodge with the Accountant of the Court of Session a distinct rental of the lands committed to his management, a list of funds, and an inventory of moveables, all of which, when adjusted and approved by the Accountant, shall be signed by him and the factor, and shall form a ground of charge against the factor. If at any time thereafter additional property belonging to the estate shall be discovered, the factor shall report the same in his next account of charge and discharge to the Accountant.

491. (3.) The factor shall close his accounts once a year, and lodge them with the Accountant.

492. (4.) He shall lodge the money in his hands in one of the banks in Scotland established by Act of Parliament or Royal Charter, in a separate account, in his own name as factor ; and if he shall keep in his hands more than fifty pounds, he shall be charged at the rate of twenty per cent. on the excess for such time as it shall be in his hands beyond ten days ; and unless the money has been so kept from innocent causes, the factor shall be dismissed from his office, and shall have no claim for commission.

493. (5.) If the factor shall fail in the discharge of his duty, he shall be liable to such fine as the Court may determine, to the forfeiture of the whole or of part of his commission, to suspension or removal from his office, or to any one or more of such penalties as the Court, in its discretion, shall decide ; and

this in addition to any liability for damages done to the estate by his misconduct.

494. (6.) The factor may apply to the Court, through the Accountant, for special powers not coming within the ordinary course of factorial management, either for improving the estate of a minor, or for providing for the comfort of a lunatic or other incapable, by sinking a portion or the whole of his estate on annuity.

495. (7.) The Crown is empowered to appoint a person versant in law and accounts, to be called the Accountant of the Court of Session, and whose duty it shall be to superintend generally the conduct of all judicial factors and tutors and curators; to adjust their rentals, lists, and inventories; and to audit their accounts.

496. (8.) The Accountant's audit and report are conclusive against the factor and his cautioner, unless objected to within twenty days. Where objections are lodged, and where the Accountant adheres to his audit, the matter shall be brought before the Lord Ordinary, whose judgment shall be subject to the review of the Court, at the instance of the factor, but not of the Accountant.

497. (9.) The Accountant shall make an annual report to the Court of Session of all judicial factories, which shall be printed.

498. (10.) The Accountant may make requisitions and orders on the factor, and report to the Lord Ordinary or the Court any disobedience to such order, or other failure of duty of which he may be guilty.

499. (11.) If the Accountant shall see reasonable grounds for suspecting malversation on the part of the factor, or such misconduct as to infer removal or punishment, he shall be entitled to lay a case before Her Majesty's Advocate.

500. (12.) Factories constituted before the passing of the Act are placed under its provisions.

501. (13.) The Accountant is empowered to require information from banks as to the funds of estates under his charge, and he is made the custodier of such bank receipts as were formerly lodged in the hands of the Clerk of Court.

#### V. CAUTIONERS FOR GUARDIANS.

502. Cautioners are required for tutors-at-law, tutors dative, curators, factors *loco tutoris*, and curators *bonis*. (Fraser, 515.) Sometimes the cautioner binds himself simply as such, sometimes he is bound as full debtor, or conjointly and severally with the principal; and the same is the case where there are more cautioners than one. (Ib.)

503. Where he is bound simply as such, the cautioner should expressly provide that the principal shall be discussed before any claim is made on him, otherwise he will not have the benefit of discussion. (19 and 20 Vict. c. 60, sec. 8.)

504. Where there are several sureties, each is liable only for his share of the debt, and cannot be called on by the creditor to pay more, unless in the case where, from the insolvency of one cautioner, the rest must contribute *pro rata* for his share. (Ersk. iii. 3. 63; 1 Bell's Com. 347, 5th ed.) Where a number of cautioners are bound as co-principals, *i.e.* as full debtors with the principal obligant, they have neither the benefit of discussion nor division, and consequently any one may be sued for the whole debt. (Ersk. iii. 3. 61; Ross's Lect. i. 78.)

505. The Court will allow policies of the British Guarantee Association to be lodged as bonds of caution by judicial factors. (Burnett, July 8, 1859.)

#### VI. GUARDIANSHIP OF INSANE AND FACILE PERSONS.

506. The sovereign, as *pater patriæ*, has always been recognised by the law of Scotland as guardian of the insane; but

this right is never exercised till the fact of insanity has been ascertained by legal process, and, except where the public interest is concerned, is always delegated to tutors or curators. (Balfour, p. 122, No. 107.) By the statute 1585, c. 18, the rule of the Roman law was adopted, and it was determined that the nearest male agnate of lawful age is the person entitled to the guardianship of his insane relative, in whatever form the insanity may be evinced.

507. It would seem that, in anticipation of insanity, a person may appoint a guardian to himself. (Fraser, 524.)

508. The father is administrator-in-law for his children; and should they become insane, and continue in this state after majority, he is still their guardian in preference to all others. (Ersk. i. 7. 50.) To entitle the father to act in this capacity after majority, however, the child must be cognosced. (Fraser, 534.) Mr. Bell is of opinion that the father possesses no power to name testamentary tutors to an insane person, to continue after majority. (Prin. 2111; Crawford, 1828, 6 S. 749.) It has been held at least that he cannot nominate them after majority. (Duke of Athol's Curators, 3 Jur. 149.)

509. *Tutors-at-law*.—The procedure in the appointment of tutors-at-law to the insane, as now altered from the old law and fixed by 31 and 32 Vict. c. 100, sec. 101, and relative Act of Sederunt of Dec. 3, 1868, is as follows:—

510. The old forms of brieves of furiosity and idiotry, with a Latin formula, are abolished, and a brieve from Chancery in the English language may be directed by any near relation to the President of the Court of Session, "directing him to inquire whether the person sought to be cognosced is insane, who is his nearest agnate, and whether such agnate is of lawful age; and such person shall be deemed insane if he be furious or fatuous, or labouring under such unsoundness of mind as to render him incapable of managing his affairs; and such brieve shall be served on the person sought to be cognosced, on *induciae* of fourteen

days : and the brieve shall be tried before the Lord President," or any other judge to whom he may remit, "and a special jury ; and the trial shall be conducted in the same manner as jury trials in civil causes in Scotland are conducted ;" and the verdict is retoured to Chancery.

511. The first duty of the jury is to ascertain the state of mind of the person alleged to be insane ; and, for this purpose, the best evidence, both medical and by acquaintances, must be laid before them. The members of the inquest may themselves be witnesses. It has been settled by a judgment of the House of Lords, that in proof of insanity it is not competent to adduce evidence of the insanity of the relations of the party alleged to be insane. (*M'Adam or Walker v. M'Adam*, 1 Dow 177, 1806.)

512. The evidence may be taken by commission (*Fraser*, 530); but the party must be produced to the jury, in order that they may judge of his condition by ocular inspection. (*Ersk. i. 7. 51.*)

513. The jury next fixes the period at which the insanity commenced ; and who is the nearest male agnate, and as such entitled to the guardianship. (*Ersk. i. 7. 50.*)

514. This provision of the statute (1584, c. 18) does not apply to the case of a wife, whose husband is her guardian at all times, and her tutor when cognosced to the exclusion of the nearest agnate. In such a case, the only object of cognition is to confer on the husband exclusive powers of management and coercion, which he does not possess as husband simply. (*Jardine v. Currie*, July 8, 1825 ; *Fraser*, 534.)

515. Should the nearest agnate decline the office, the next agnate cannot accept it ; and the only mode of remedying the defect is the appointment of a tutor dative or a curator *bonis* by the Court of Session. (*Bryce v. Graham*, Jan. 25, 1828.)

516. Tutors to the insane possess the same powers as tutors to pupils, and are subject to all the provisions of the Pupils Protection Act. (*Ante*, p. 104.)

517. Where the office terminates by the restoration of the lunatic to sanity, the fact of convalescence must be determined by a decree of the Court of Session, on an action of declarator of convalescence. (*Bryce v. Graham*, Jan. 25, 1828.) It has often been remarked, that if the question of insanity be a proper one to be submitted to a jury, that of sanity would seem also to fall within their province; but such is not the rule of the law of Scotland.

518. After a decree of convalescence has been pronounced, the Court cannot, though the person should relapse into insanity, authorize the tutor to resume the management without a new verdict. (*Ederline's Tutor*; *Elch. vide Tutor*, No. 12.)

519. The tutor is not entitled to resign office merely because there is a lucid interval. But, after a complete cure, the tutor may resign, and permit the person cognosced to resume the administration of his affairs, without any legal process being resorted to. In this case, however, the person who has been insane must take pains to preserve proof of sanity in any important transaction. (*Bell's Prin.* 2111; but see *Ersk. i.* 7. 32, and *Fraser*, 542.) A verdict of insanity may be reduced and a new *briefe* directed. (*Bell's Prin.* 2107.)

#### VII. CURATORS BONIS TO THE INSANE APPOINTED BY THE COURT OF SESSION.

520. Should no person apply for the office of guardian in any of the forms just explained, it is competent for any of the next of kin to apply to the Junior Lord Ordinary of the Court of Session for the appointment of a curator *bonis*.

521. The petition for the appointment of a curator *bonis* must be served on the fatuous person himself. (*Gordon v. Gunn*, June 30 and Dec. 22, 1832.) It must be accompanied by the certificate of two medical men, which must be on "soul and

conscience," which is a sort of medical oath. (Campbell, June 14, 1830.)

522. When the petition is opposed, the Court remit generally to the Sheriff of the county where the lunatic resides, to inquire into the grounds of the application, with power to examine medical and other witnesses, and to visit the individual himself, and state his own opinion. (Bryce v. Graham, Jan. 25, 1828; affirmed July 23, 1828, 3 W. and S. p. 323.)

523. On advising the proof and report, the Court will determine whether the appointment should be made or refused. (Dewar, Jan. 21, 1838.)

524. The curator *bonis* has no power over the person of the insane, his office being entirely confined to the management of the estate; and hence the advantages attending the appointment of a tutor dative. (Bryce v. Graham, Jan. 25, 1828; Robertson v. Elphinstone, June 28, 1814.)

525. When the fatuous person thinks himself recovered, there is here no necessity for raising an action of declarator of convalescence. It is sufficient to present a petition for the recall of the curatory; and if this petition is opposed, the Lord Ordinary will remit to the Sheriff, as when the appointment is opposed. And although there has been cognition, or a curator *bonis* has been appointed, this will not, in reference to his deeds, be by any means conclusive proof that a person is insane, but will merely alter the presumption of law, that all men are sane until the reverse be established. In practice, this fact is usually determined by the verdict of a jury.

526. The office of *curator bonis* comes to a close by the service of the tutor-at-law; and it is competent for the fatuous person to present a petition for the recall of the curatory, which will be sustained on proof of recovery, no declarator of convalescence being requisite. (Fraser, 550.)

527. Though the presumption of law is in favour of sanity till cognition has taken place, or a curator *bonis* been appointed,

still deeds may be reduced on the ground of insanity, though there has been no cognition. All that is requisite for this purpose is, that the fact shall be clearly established during the course of an action of reduction before the Court of Session. (*Gordon v. Gunn*, June 30, 1830.)

## VIII. INTERDICTION.

528. Idiocy and madness are the extremes of incapacity. Between them and sanity of mind there lie numberless degrees of imbecility and incapacity, and for these the law has provided protection by interdiction; a proceeding, however, which is now very rarely resorted to.

529. Interdiction is of two kinds—voluntary and involuntary.

530. (1.) Voluntary interdiction is an arrangement which a person, conscious of his own imbecility, makes in order to protect him from the ruin which his improvidence would entail on him. (*Fraser*, 554.)

531. Voluntary interdiction is imposed by the execution of a deed termed a bond of interdiction. It narrates, as shortly as possible, the cause of granting, declares the granter's confidence in the persons whom it nominates interdictors, and binds, obliges, and interdicts the granter, during the whole days of his life, from doing any deed alienating or contracting without their consent. Though the granter will be permitted to touch on his own weaknesses very slightly in the narrative of the deed, there must be a valid cause for the restraint in point of fact, otherwise the deed will be set aside. (*Ersk. i. 7. 53*; *Stair, i. 6. 37*; *Stewart v. Hay*, M. 7132; *Braimer v. Innes*, Feb. 13, 1789.)

532. Interdiction is completed by publication and registration in the public register of interdictions. (*Ersk. i. 7. 56*; 1581, c. 119; *Fraser*, 557.)

533. (2.) *Judicial Interdiction*.—This form is not adopted by

the prodigus himself, but by his friends, who resort to it as the only means of protecting him when his defects are not of such a degree as would justify them in applying for a curator *bonis* on the ground of insanity, or of having him cognosced as an idiot or a madman. (Stair, i. 6. 38 ; Fraser, 558.)

534. It does not appear that any but relatives can competently raise an action of interdiction ; but a supreme judge, in the exercise of the *nobile officium* which he has inherited from the prætor, if he perceive, during the pendency of a suit, that either of the litigants is, from the facility of his temper, subject to be imposed on, will interdict him of his own accord. (Ersk. i. 7. 54.) There are, however, no recent instances of such a proceeding.

535. If appearance be made in the action of interdiction, the Court will proceed to proof of the character and disposition of the alleged prodigus, and determine according to its import. (Thomson, M. Ap., *voce* Interdiction, 1, and 5, sup. p. 488.)

536. Judicial interdiction must be published and registered in the same manner as voluntary interdiction. (Ersk. i. 7. 56.)

537. It is unnecessary to intimate the interdiction to the prodigus. (Ib.)

538. The interdictors have no duty imposed on them, and no right to exercise, beyond that of merely consenting to deeds relating to heritage. If the deed be rational, onerous, necessary, or beneficial, it is perfectly valid without their consent. They have no general management of the affairs of the interdicted person, and are therefore not bound to render accounts. (Stair, iv. 20. 30 ; Ersk. i. 7. 59 ; 1 Bell's Com. 140.) If they consent to an irrational deed, they are liable to the interdicted person for the loss sustained, but the deed is valid to the other party to it ; a rational deed in favour of one of themselves, even, has been sustained.

539. Interdiction is further confined exclusively to heritage, and has no application to any deed by which the moveable estate may be affected. (Ersk. i. 7. 57 ; Stair, iv. 20. 33.)

540. Notwithstanding interdiction, the prodigus is moreover entitled to make a settlement of his heritable estate *mortis causa*, in the same manner as the most unlimited proprietor. (*Mansfield v. Stuart*, June 26, 1841.)

541. As interdiction does not affect moveable property, it is competent, on the personal obligations of an interdicted person, to raise and execute all the diligence of the law, with the single exception of attaching his heritage. (*Fraser*, 563.)

542. An interdicted prodigus may vote at the election of a member of Parliament. (*Wight on Elections*, 268; *Fraser*, 565.)

543. A judicial interdiction cannot be taken away otherwise than by the sentence of the Court which imposed it. (*Stair*, i. 6. 43; *Ersk.* i. 7. 55; *More's Notes*, p. 45.) Voluntary interdiction falls by the death of the interdictor (*Ersk.* *ib.*; *More's Notes*, *ib.*; *Hepburn v. Hepburn*, M. 7154); or the prodigus may recall it with the consent of his interdictors (*Ersk.* i. 7. 55; *Fraser*, 567.)

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## CHAPTER IV.

### MASTER AND SERVANT.

544. The complete family, both in ancient and modern times, has been regarded as embracing the servants of the house; and service has thus generally been considered as belonging to the domestic relations. But so mercenary has the relation become in our own day, that the contract of service might, with equal propriety, be treated of under the head of Letting and Hiring.

545. Service is a contract whereby one person agrees to pay to another a certain sum of money for services, which the other agrees to render him for a definite period. In all free service there is an implied condition to the effect that the contract

shall be voidable by either party, at any time, on payment to the other of the damages which his failure to implement it may have occasioned him. (Fraser, Master and Servant, 3.)

546. Every person of lawful age, and not subject to any natural or legal incapacity—that is, every person who is capable of contracting—may be either a master or a servant.

547. A pupil cannot enter into a valid contract of service either as a master or a servant; and it is consequently necessary, when he contracts to serve, that either his father or his tutor should become bound for him. (Ersk. i. 7. 14.)

548. A minor may enter into the contract of service, in either capacity, without curators (Ersk. i. 7. 33; *Campbell v. Baird*, Feb. 13, 1827); but the contract of service, like other contracts, will be reducible by him on proving lesion; and if he have curators, or if his father be alive, a contract of service entered into by the minor, without consent, is null. (Ersk. i. 7. 33; *Stair*, i. 6. 33; *Low v. Henry*, Nov. 14, 1797; *Hume*, 422.) Where the servant, being a skilled workman, was seventeen years of age, it was held that the protection of curatory was unnecessary. If, in the ordinary case of a minor entering into a contract of service, the father be alive, or the minor have curators, the contract is not merely reducible, but is absolutely null; but if he falsely hold himself out to be major, or that a party consenting with him is his curator, the minor will be bound by the contract. (Fraser, 9.)

549. A married woman in England, and probably with us, can hire domestic servants as her husband's representative (Fraser, 14, 252); but she cannot become a servant to another without his consent; and should she attempt to do so, he is entitled to recover her person. (Fraser, 15; *Whyte v. Cuyler*, 1 Esp. N. P. C. 200, 6 T. R. 176.)

550. The contract of service may be entered into either verbally or by writing.

## I. VERBAL CONTRACT.

551. A verbal contract of service can only endure for one year, [if entered into in Scotland; but if made in a country where verbal contracts may be made for a longer period (as in England), it will be enforced in Scotland, if it falls to be implemented there]. (See *Fraser*, 29; *Caddell v. Sinclair*, M. 12416; *Dale v. Dumbarton Glass Co.*, Feb. 5, 1829.)

552. A verbal contract of service for more years than one is not effectual even for the usual term, unless it has been partially implemented. (*Paterson v. Edington*, June 17, 1830.)

553. It is complete when the parties are agreed as to the hire, the duration, and the nature of the service.

554. It may be proved by witnesses. (*Fraser*, 30.)

555. It lies with the party who seeks to enforce the contract to prove its terms. There is no presumption in law that such contracts are unconditional; and so, if the defender plead a condition in bar, the pursuer (or party founding on the contract) must prove its terms. (*Forbes v. Milne*, Nov. 17, 1827; *Thomson v. Isat*, May 18, 1831.)

556. If it be agreed that a contract of service for one year shall be reduced to writing, the contract is incomplete till the writing be executed, and either party is entitled to resile. But if the service has been entered on, the contract will be effectual for the period, and on the conditions usual in the particular employment, though no writing should ever follow. (*Caddell v. Sinclair*, M. 12416; *Paterson*, June 17, 1830.)

## II. WRITTEN CONTRACT.

557. If the contract of service is to endure for more than one year, it must be reduced to writing, and cannot be proved by parole evidence. In this respect it stands on the same footing

with the contract of lease. (*Paterson v. Edington*, June 17, 1830; *Kennedy v. Young*, March 13, 1837.) But if such a contract is entered into, verbally, in a foreign country, by the law of which it would be held binding, provided the service had been actually entered upon, it would, on the principle of *lex loci contractus*, be held binding with us. (Fraser, 28.)

558. The contract of service of any labourer, artificer, manufacturer, or menial servant, does not require any stamp. (55 Geo. III. c. 184.) The exemption applies only to proper cases of hiring, and therefore not to contracts "relating to the service or tuition of any apprentice clerk, or servant placed with any master to learn any profession, trade, or employment" (33 and 34 Vict. c. 97, sec. 39). It applies to the hiring of firemen and stokers on board a steamer, who are not mariners, but not to the employment of clerks, or to cases of *mixed* contract. (Fraser, 34.)

559. The writing must consist either of a probative deed, or of the interchange of holograph writings between the parties. (*Paterson v. Edington*, *ut sup.*)

560. Defects in the legal solemnities cannot be supplied by a reference to the oath of the party who is attempting to invalidate the contract; but they may by proof (either by reference to oath or otherwise) of what is called *rei interventus*,—that is to say, of any transaction between the parties which has taken place in consequence and on the faith of the contract. *Rei interventus* will render a verbal engagement binding only for one year; but it will validate an informal written contract for the whole term. The *rei interventus* itself may be proved by parole evidence. (Fraser, 34–36.)

561. *Earnest*, or *arles*, is a sum of money given by the master to the servant, in token that the contract is complete. Such earnest is not necessary to constitute the contract, except by force of a uniform and notorious local custom; and even though given, it will not constitute *rei interventus* so as to validate a

contract otherwise defective. Its only value is, therefore, as an adminicle of proof. Where there is a uniform and notorious local custom that there is no contract until arles is given, either party is entitled to resale, while arles has not passed. (Fraser, 36.)

### III. IMPLIED CONTRACT.

562. Where the contract has expired, and the relation between the parties continues unchanged, they are held to have renewed the contract by tacit consent or relocation, without any new engagement being entered into. This presumption, however, will be removed, should the local custom require express renewal, as is said to be the case in the Border counties. The period of renewal cannot be longer, though it may be shorter, than one year, since the implication of law is that a new verbal contract has been entered into. (Fraser, 39 *et seq.*)

563. Where one near relation lives in another's house, and discharges the duties of a servant, there being no contract, are wages due? The decisions of the Court have varied considerably. At first it was held that the presumption of law was, that services so rendered were gratuitous; afterwards it was held there was no presumption either way, but that the party averring the contract must prove it; then again it was held, that if the services be admitted or proved, the presumption of law is in favour of payment, unless the contrary be established. "In all cases of this description, where there is a clear proof of service rendered and no wages paid, wages are due, unless it be made out that there was an agreement that the service should be gratuitous; and this presumption of law is not overturned by the circumstance that the parties were relations, that the servant was poor, and that there was no express agreement for wages." —Per Lord President (Anderson v. Halley, June 11, 1847, 9 D. 1222.) [This dictum must, however, on a review of the whole

[decisions on the question, and more particularly from the later one of Ritchie (1849, 12 D. 119), be taken with some limitation. "The question of remuneration seems rather to depend not upon any general presumption, but upon a consideration of the whole circumstances under which the services were performed." (Fraser, 44.)]

#### IV. DURATION OF THE CONTRACT.

564. There is no illegality in a contract of service extending over many years, or even possibly for life. (Grot. de jure bell. ii. 5. 27; Ersk. i. 7. 62; Hutchison, Justin. ii. 161; *Faire v. M'Vicar*, 2 Hutch. p. 168, note; Bell's Prin. 174.) Such a contract, having inherent in it the condition that it is voidable by either party on payment of the pecuniary damages which his non-implement may have occasioned, has in reality nothing more of the character of slavery than an agreement to serve for a month or a year.

565. When the period of duration is not expressly mentioned at the hiring, the law, proceeding on the presumed intention of the parties, adopts the customary term of engagement in that particular line of service and district of the country. The circumstances of wages having been rated at so much a year, will not overcome the presumption that the engagement was for half a year, or whatever else may be the ordinary period. (Bell's Prin. 174.)

566. *Domestic Servants.*—In Scotland, the presumption in the case of domestic servants would probably still be held to be in favour of a six months' engagement (Hume's Decisions, p. 393; Bell's Prin. 174; Fraser, 52); but the English practice of hiring from month to month, which has been recently adopted by many families, would render the presumption more easily overcome by contrary proof than it would formerly have been.

567. *Rural Servants*.—Farm servants and gardeners are presumed to be hired for a year, because their occupations depend on the revolutions of the seasons, and one part of the year is a time of labour, and the other the reverse. (Hume's Decisions, p. 393; Bell's Prin. 174; Fraser, ib.)

568. *Overseers, Managers, etc.*—In the case of all persons of a superior station, the presumption will be for a year's duration, as it is not likely that they would accept situations from which they might be dismissed, at the pleasure of their superiors, at a moment's notice. (*Finlayson v. M'Kenzie*, June 6, 1829.)

569. *Tutors, Governesses, and Clerks*.—The general presumption in favour of a yearly engagement would seem to be less strong in the case of these parties than in that of stewards, grieves, or overseers; and, from the intimate personal contact which, in such situations, must take place between the employer and employed, there is much convenience to both parties in the contract being dissolvable at the pleasure of either. In the absence of all evidence as to custom, either of the country generally or of the parties, the contract being in its own nature one of some duration, would probably be held to endure for a year. (*Moffat v. Sheddon*, Feb. 8, 1839; Bell's Prin. 174; Stephen's Com. ii. 240; Fraser, 54.)

570. *Managers of Banks and Editors of Newspapers*.—The practice applicable to this class of servants does not seem to have been so uniform as to give foundation for any presumption, and questions arising between them and their employers would at once be remitted to proof. (Fraser, 56, 57; Bell's Prin. 189; Campbell, 1851, 13 D. 1041.)

571. *Engagement during Pleasure*.—Wherever there is an engagement of this nature, the servant may be dismissed at any time, without the employer being bound to assign any reason for his act. (*Mitchell v. Western Bank*, Jan. 26, 1836.) Where employment is by the piece, the workman's connection

with his employer is terminated by the completion of his task, unless usage or agreement to the contrary is proved.

572. *Terms of Entry*.—These for domestic and rural servants are generally Whitsunday and Martinmas, old or new style, according to local custom. The contract terminates by the same style by which it begins.

573. *Obligations of the Servant*.—The servant is bound to enter the service at the term agreed on. He cannot compel the master to accept a substitute, seeing that a preference of the particular person hired—a *delectus personæ*—is of the essence of the contract. (Campbell v. Price, Jan. 13, 1831.)

574. The servant is bound to continue in the service for the time specified. If he quits it, the master may refuse to take him back, and may claim damages for breach of contract. In some cases he may insist for specific implement by the compulsitor of imprisonment. (Fraser, 66 *et seq.*; Raeburn v. Reid, June 4, 1824; Gentle v. M'Millan, July 9, 1829; but see Tulk v. Anderson, June 1, 1843.)

575. It had been decided previously to the passing of the workman's statute, that a workman, mechanic, or artisan, who, after having entered to his service, deserts or leaves it without giving the stipulated notice, may be compelled, by imprisonment, to find caution to return to his service and continue therein. (Authorities for previous section.) The ground on which the Court enforced against a servant in breach of contract, a remedy which they would not have given the servant against his master if the latter had violated the engagement, was that, by the sudden desertion of workmen and apprentices, the owners of large establishments might sustain enormous losses, not to be compensated by any damages which they could possibly recover from their servants.

576. The soundness of the decisions on this point have been doubted on very high authority; and, except as regards cases falling within the provisions of the workman's statute (4 Geo.

rv. c. 34), it seems doubtful whether the compulsitor of imprisonment can be legally applied. So strongly, indeed, have the difficulties of the subject been felt, that in 1846 a consultation of the whole Court was actually ordered; but the case (*Lees v. The Grangemouth Coal Co.*, Feb. 26, 1846, *Jurist*, p. 273) in which the point had arisen was, unfortunately, taken out of the Court by a compromise. [The above-cited Act has been repealed by 38 and 39 Vict. c. 86, and whether the common law doctrine laid down in the case of *Raeburn* is still in force as to questions which would have fallen within the provisions of that statute, has not yet been the subject of decision. Lord Fraser (383) is of opinion that the incompetency of the remedy of imprisonment of a workman who has deserted his service is involved, though not expressed, in the terms of the Employers and Workmen Act, 1875 (38 and 39 Vict. c. 90).]

577. It has never been held that the contract of service can be enforced by imprisonment against a domestic servant; and the principle on which the rule was introduced seems to exclude from its operation all but artificers, colliers, and the like. It has not even been applied to professional men, clerks, artists, authors, and overseers, though it is very possible that the loss occasioned by their failure to implement their contracts might exceed their ability to pay damages. (*Paterson v. Edington*, June 17, 1830; *Bookless v. Normand*, Nov. 20, 1832.)

**V. EXCEPTIONS TO THE OBLIGATIONS ON THE SERVANT TO ENTER AND CONTINUE IN THE SERVICE, OR ON THE MASTER TO RETAIN HIM.**

578. *Enlistment*.—It is provided by the [Army Discipline and Regulation Act, 1879 (42 and 43 Vict. c. 33—continued by the annual Army Act), which now comes in place of the annual Mutiny Act,] that if servants enlist [in the regular forces] their masters have no right to have them restored. [The Act, however,

[apparently leaves the enlisting servant liable at common law in an action of damages for ordinary breach of contract, or at least, contrary to the provisions of the former Mutiny Acts, for forfeiture of the wages already earned. The master, however, cannot compel the soldier to appear in person in any court, unless his claim be for more than £30, exclusive of expenses. He may, however, proceed in his action and have execution, "other than against the person, pay, arms, ammunition, equipments, instruments, regimental necessaries, or clothing of such soldier" (sec. 181). Enlistment in the militia does not put an end to the contract, but merely entitles the master to an abatement from the servant's wages during the time he is called out (38 and 39 Vict. c. 69, sec. 68).]

579. *Marriage of Female Servant.*—It is the general opinion of lawyers in Scotland, that a female servant who marries is entitled to quit the service—her husband, not her master, being entitled to her person. In this case, however, the master will have a claim for moderate damages, though whether or not this claim would be valid against her husband, is yet undecided. (Bell's Prin. 181.) On principle, the liability of the husband is clear; marriage is as much his act as the wife's. The marriage of a servant is no ground of dismissal, if he or she be content to serve, and does actually serve, as formerly. (Fraser, 323.)

580. *Sickness.*—If the sickness be caused by a hurt sustained while engaged in the master's service—*e.g.* by a kick from his horse, or the bursting of his fowling-piece—the servant is entitled to full wages, and if he lived in the family, to board wages up to the period of the termination of the contract. (Bell's Prin. 179.)

581. If the master offer to maintain the servant in his own house, the servant, in the general case, is not entitled to leave, and claim board wages; but, if it be found necessary for the servant's recovery that he should be removed, the master must pay board wages. If the servant's sickness has arisen from

overtasking, the same principles are applicable. (Fraser, 139 *et seq.*)

582. The servant will not be entitled to wages after the term of his engagement, though the effect of the injury continue after that period. Any further claim he may have against the master, on the ground of improper exposure to danger or otherwise, will resolve itself into an ordinary claim for damages.

583. If the sickness be referable to no cause which the master could possibly have controlled, the rule is, that wages and board wages will be due only where the illness is of moderate duration; and a deduction from these will be made if the length of the sickness be very great, considered in relation to the length of the engagement. (2 Hutch. p. 166; Bell's Prin. 180; Fraser, *ib.*; and 320.)

584. It has not been laid down by any of the authorities what shall be considered a short, a long, or a moderate period of sickness. Such questions of degree admit of no precise rule; and, if they cannot be solved by the good sense and good feeling of the parties, must be left to the discretion of the Court. (Fac. Coll., Nov. 29, 1794; White, M. 10147; Maclean v. Fife, Feb. 4, 1813, F. C.) The period that a servant is entitled to board and wages during illness varies with the length of the contract of service. In one case eleven weeks was not held too long a period, but there seem to have been specialties. (Fraser, 189 *et seq.*)

585. Where a substitute has been required, the sum paid to him will furnish some guidance for determining the deduction to be made from the wages of the servant.

586. *Sickness caused by the Servant's own misconduct, debauchery, or imprudence*, will entitle the master to dismiss him during the period of engagement. Here the case is the same as if the servant had been guilty of a breach of contract, and he cannot in any case exact more wages than for the period during which he has fulfilled it. He cannot compel the master to keep

him useless in his service, or to board him in his house, even should he be willing to forego wages. (Lord Eldon in *Simmons v. Wilmot*, 3 Esp. 91; Fraser, 319.)

587. In like manner, where the sickness had begun and was known to the servant, but concealed from the master, at the date of entering into the contract, wages will be due only for the time he has actually served. There is an implied warranty in the contract, that the servant has the physical capacity to fulfil it. (Fraser, *ib.*) This rule, however, will not entitle the master to rescind from the contract merely because the strength of the servant proves inferior to his expectations. The only case in which it will operate is where there has been fraudulent concealment of disease, *e.g.* that the servant is subject to epilepsy.

588. Workmen earning weekly wages, and not residing in the master's house, have no claim against the master if they have been disabled by sickness from discharging duty. Neither does such exist in the case of any other class of servants, if their engagement is liable to come to an end on a moment's warning.

589. Where mechanics or artisans are engaged for a lengthened period, they will probably be found to have the same claim to wages during sickness of moderate duration as domestic servants, though not of course to board wages.

590. *Insanity*, being only another form of sickness, is governed in the case of the servant by the same principles. Where the master is a lunatic, it has been decided in England that he is liable to pay for any services which had been rendered to him, provided they were such as might reasonably be considered necessary for a person in his station of life. (*Baxter v. Earl of Portsmouth*, 5 B. and C. 170.)

591. Where the parties stipulate that for every absent day the servant shall serve two, this stipulation will be held to have no reference to days on which the servant is sick. (Fraser, 55, 2nd ed.)

592. *Imprisonment.*—When the servant is carried away to prison for a crime of which he is found guilty, or for a debt which is found to be unpaid, then, as the contract was broken by his voluntary act, he is liable in damages, and the master is free from the contract. If, on the other hand, he be imprisoned on suspicion of being guilty of a crime of which he is ultimately acquitted, he is not liable in reparation; and the master is bound by the contract, because there was no voluntary breach of engagement. (Bell's Prin. 182; Fraser, 322.)

593. *Death of Servant.*—If the servant die before the term be elapsed, wages are due to his heirs only for the time he actually served. (Ersk. iii. 3. 16; Bankt. iii. 20.)

594. *Death of Master.*—If the master die, or without good reason turn off a servant before the term be elapsed, he will be entitled to his full wages, and to board wages, if he had bed and board in the family. (Ib.; see *infra*, Termination of Contract.)

595. *Skill and Care.*—The servant is bound to exercise ordinary skill and assiduity; the amount of each depending, of course, on the nature of the occupation.

596. If the service is one calling for what is more strictly denominated skilled labour, he will be liable in such damages as his want of ordinary ability in the craft to which it belongs may have occasioned. Thus, if a farrier undertake the cure of a diseased or lame horse, and if the horse die through his ignorance, he is liable for the loss. (Bell's Prin. 148. 9; Burnet v. Clark, M. 8491.)

597. In like manner, if the service calls for unusual assiduity, he will be held to have promised it by undertaking the duty. Thus, a person who undertakes to act as a sick-nurse will be liable in damages, though his assiduity may have been such as would have been highly creditable in a valet.

598. So also in the case of a person employed to work on materials of unusual value. A person employed to clean a

jewel is liable in greater negligence and care than he who has undertaken to mend a cart. (1 Bell's Com. 459 ; Prin. 152.)

599. The same is the case with ordinary servants of every description.

600. If a person who hires himself as a cook is unable to perform the duties of such a situation, the contract is not binding on the master (Ersk. iii. 3. 16 ; Bell's Prin. 155) ; and so with regard to any other servant, whether male or female, domestic, agricultural, or manufacturing. But if, at the time of hiring, the servant acknowledged that he was imperfectly qualified for the office, and honestly let the master know his defects, the latter is not entitled to repudiate the contract, although the servant does not display the usual skill of a servant hired for the place which he fills. (Gunn v. Ramsay, June 3, 1801.) In such a case, the servant is only bound to exercise the skill and judgment which he possesses. (Bell's Prin. 154.)

601. A servant must be careful of his master's property ; and the master will be justified in dismissing him, not only for wasting it without cause, but for entertaining his friends with it, or even for giving it away in charity. (Cunningham v. Fonblanque, 4 C. and P. 49.)

602. If a servant wantonly maim a horse, or override him, or otherwise disable him, he is liable to his master for the damage which he occasioned, and in some cases may be dismissed. (Fraser, 68 ; Ersk. *ut sup.*)

603. In short, negligence of all sorts is a breach of contract, and consequently a ground of dismissal and forfeiture of wages, though the rule is one which must not be applied on trifling occasions or for trivial faults. Delay to open the door would not be a sufficient ground for dismissing a footman, unless obstinately persevered in in defiance of orders.

604. *The Servant is not liable for every damage that may be done by him.*—If ordinary care and diligence have been employed, a maid-servant would not be liable though some of the

dishes belonging to her mistress had been broken in her hands. Servants cannot be entirely perfect ; and unless the damage has arisen from absolute carelessness or rashness, the master must bear the loss of his property as one of the inconveniences of hiring servants. (1 Bell's Com. 458 ; Fraser, 69). Still less is the servant responsible for damage which is the result of accident, or of the fault of another.

605. If a servant is robbed of his master's property, he is not liable for it ; for he only contracts for his own diligence and fidelity, not for the honesty of others, or his own strength and courage. (*Walker v. Guarantee Association*, 18 Q. B. 278.)

606. If a servant rob his master, the latter is entitled to dismiss him without warning, or wages even for the period for which he has served, and will also have an action for damages against him, which will not be affected by any punishment which he may suffer as the result of a criminal prosecution. (*Cunningham v. Fonblanque*, 6 C. and P. 49 ; Fraser, 86.)

607. *The Servant must be respectful.*—There is no offence which courts of law have been so uniform in holding to be a valid ground of dismissal as insolence. (Fraser, 70.) Were it not so, the distinction between master and servant must either be lost or preserved by acts of personal chastisement, which modern law does not permit.

608. This rule extends to the relation between a tradesman and his journeymen or shop-boys, though a speech, which might justly be deemed insolent when coming from a menial servant to his master, will often admit of a different construction when addressed to a tradesman by a servant who scarcely differs from him in social position. A slighter amount of disrespect will entitle a master to dismiss his journeyman, if it has taken place in the presence of other journeymen or apprentices. (*Handyside v. Arthur*, Feb. 7, 1787, Arniston Pap. ; and Fraser, *ut sup.*) An angry word spoken under provocation, or a disrespectful expression or action, if fully apologized for, will not, unless of a

very flagrant character, be sufficient to sanction the dissolution of the contract. (Fraser, 71.)

609. *Servant must be obedient.*—Disobedience is a breach of contract which clearly warrants dismissal. (Hume's Dec. 392 ; Spain v. Arnot, 2 Stark, 256 ; Fraser, ib.)

610. The master is in no case bound to assign any reason for a command which is lawful in itself, and within the fair meaning of the contract ; and it is an act of disobedience on the servant's part to insist for such reasons before performing what he is commanded. (2 Hutch. 168 ; Fraser, ib.)

611. The master is entitled to control the hours of dining (Spain v. Arnot, *ut sup.* ; Callo v. Brouncker, 4 C. and P. 518 ; Turner v. Mason, 14 M. and W. 112 ; Amor v. Fearon, 4 C. and P. 518), sleeping, church-going, and the like, of his servants ; and any violation of his instructions in these respects, unless they were in the highest degree unreasonable, would be an act of disobedience, exposing the servant to the penalty of dismissal. (Fraser, 72.)

612. A female servant having fallen sick, her master administered calomel to her on a Sunday, and commanded her to stay at home. Notwithstanding this, she went to church, on the ground that, by the custom of the place, she was entitled to that day as her "Sunday out." The master dismissed her ; and the Court held him entitled to do so, on the ground that the servant had been guilty of disobedience to a lawful order of her master. (Hamilton v. M'Lean, Dec. 9, 1824.) In another case a master was held justified in dismissing a labouring hind for refusing to remain at home on a Sunday to attend to the cattle, so as to enable the other servants to go to church, he having been previously allowed to attend the sacrament in his own church. (Wilson v. Simson, July 11, 1844 ; Turner v. Mason, 14 M. and W. 112.)

613. A coachman was saucy in his behaviour to his master, and on one occasion remained out late, and was locked out in

consequence. The master went to inform him that he could not be admitted at such an hour ; but the servant answered that he would not be kept out, and shoved his master violently aside. Having thus made good his entry, he was rude and insolent. The master dismissed him immediately ; and the Court not only found him justified in doing so, but allowed no wages for past time. (*Elder v. Bennet*, Hume 386, March 9, 1802.) Where, on the other hand, a servant absented himself half an hour beyond the proper time on Sunday, this was not held a sufficient ground for dismissal. (*Wright v. Gibson*, 3 Car. and Pay. 583.) Thus, also, a gardener being absent one day without leave, and this being his first offence, the Court held it not sufficient to justify dismissal, and found the master liable in wages. (*Thomson v. Douglas*, Hume, 392.) But a head gardener who was absent for four days was not found entitled to wages. (*Reid v. Crawford*, Hume, 398; reversed 13th May 1822, 1 St. Ap. 124.)

614. The servant is entitled to a limited time in order to look out for another place, after warning has been given him that he is not to be retained. The extent of absence which such a cause will justify can be determined only by local custom and the reason of the case.

615. *Drunkenness*.—A single instance of drunkenness, if of an aggravated character, will justify the dismissal of a domestic servant. (*Edwards v. Mackie*, Nov. 14, 1848 ; *Speck v. Philips*, 5 M. and W. 279 ; *Wise v. Wilson*, 1 C. and K. 662.) In dealing with the case of a cook, Lord Mackenzie remarked : "If the only case made was that the pursuer had been accidentally overtaken on such an occasion as New Year's day, that would have put her in a much more favourable position ; and I would then be inclined to say, that a single fault did not justify her dismissal." (*Fraser*, 87.)

616. A master of a ship having been dismissed for drunkenness, and reinstated on condition of having no spirits on board, violated the condition, and was repeatedly drunk during the

homeward voyage, the Court held that he thereby forfeited his wages from the time at which he violated the agreement, although the ship arrived safely. (M'Kellar, Dec. 15, 1852.)

617. *Hours of Labour*.—Where no special agreement has been entered into on the point, the servant is bound to labour during all the hours of the day which the usage of the place sanctions, or which are in themselves reasonable, considering the kind of labour he has undertaken to perform. (Fraser, 79 *et seq.*)

618. As regards domestic servants, the only limitation to their hours of labour is, that they must be allowed a reasonable time for sleep, and must not be taxed beyond their strength. (Ib.)

619. Farm servants, again, are bound to labour only during the usual hours of a working day, but they are not entitled to refuse to extend these when necessity requires. (Wilson v. Simson, July 11, 1844.) Even clerks and artisans, with whom there is generally a special agreement to work so many hours, would not be justified in refusing, on a special emergency, to work an hour or two longer. (R. v. St. John Devizer, 9 B. and C. 900; Fraser, *ib.*)

620. *Holidays*.—In parts of the country where the practice of giving particular holidays is uniform and notorious, the master will be presumed to be acquainted with the usage, and to have acquiesced in it, and the servant will not be liable to dismissal though he have taken such a day without leave. (Morison v. Allardyce, June 27, 1823; Fraser, *ib.*)

621. No servant is bound to work on Sunday unless his labour come within the line of works of "necessity and mercy." (1579, c. 70.) Under this head fall the ordinary duties of domestic servants, and also of farm servants, to the extent of attending to cattle and horses. The servants of apothecaries, dressers in hospitals, and the like, fall of course under the same rule. It was decided by the House of Lords, on appeal, reversing the judgment of the Second Divison, that a barber's apprentice is not bound to shave his master's customers on

Sunday morning. (*Philips v. Juner*, Feb. 20, 1837, 2 S. and M'L 465.)

622. *Kind of Work*.—There are no questions which more frequently arise under the contract of service, than questions as to whether or not the work enjoined belongs to the kind of work contracted for, and there are none so difficult to settle. Where shall the line be drawn between the obstinacy and fastidiousness of the servant on the one hand, and the unjustifiable exactions of the master on the other?

623. The general rule is, that although the work demanded from the servant may not be within the precise line of his agreement, yet slight deviations from it will not justify disobedience, or if it be asked at a time of emergency, his scruples to do it will not be listened to. (*Bell's Prin.* 176; *Fraser*, 77.)

624. But if the deviation be great or often repeated, or if there be personal danger to the servant from want of skill, a court of law will interfere to protect him from this breach of contract on the master's part. (2 *Hutch.* 170; *Fraser*, *ib.*)

625. No servant is bound to work at a lower class of duties than that for which he was hired. A tutor cannot be compelled to act as a butler, nor a butler as a footman; a gardener cannot be forced to work in a turnip-field (*Thomson v. Douglas*, *Hume*, 392), nor can a grieve or overseer of a coal-work be compelled to assist at the windlass-wheel. (*Fairie v. M'Vicar*, 2 *Hutch.* 168, *note.*) Even where no indignity or hardship is inflicted, a breach of contract will not be permitted. A housemaid, for example, cannot be compelled permanently to undertake the duties of a cook or lady's maid, though she would certainly be bound to render occasional assistance to the cook or lady's maid, or even to do their duties during an accidental or temporary absence. (*Fraser*, *ib.*)

626. In the case of a servant of all work, there is no room for such nice distinctions, and she cannot object to do any duty incumbent on a menial servant.

627. In like manner, servants in husbandry must perform an part of the labour of the farm which their master points out to them, and are not entitled to select what is most suitable to their respective capacities or inclinations. (Fraser, 80.) [A labourer who was engaged by a farmer as a shepherd and to assist in farm-work, was required to tend cattle which were being wintered at the steading. He refused, and was dismissed. The Court held that tending the cattle was outwith the work for which he had been engaged, and that the dismissal was unjustifiable. (Moffat, 1884, 11 R. 501.)]

628. *Servants' conduct must be decent.*—It has been decided as regards all classes of domestic servants, including tutor governesses, and secretaries, that if they have been guilty of lewdness they have broken the contract. (Fraser, 84.)

629. If a man-servant debauches a female servant, both may be dismissed. (2 Hutch. 169; Ashover v. Brampton, Cald. 1208. 14; Aitken v. Acton, 4 C. and P. 208.)

630. It is not necessary, to justify dismissal, that the servant be with child; it is enough if she introduces men into the house and sleeps with them. (Fraser, *ut sup.*)

631. Improper conduct out of the master's house will be a ground of dismissal, if it can be shown to be prejudicial to the master, and hurtful to the feelings or reputation of himself or his family. (See Gunn v. Goodall, 13 S. 1142.)

632. Improper conduct previous to entering the service will not furnish a ground for dismissal. (De Grosberg, M. 16456.)

633. Indecent conduct, though not amounting to positive immorality, and obscene or blasphemous conversation, if persevered in by the servant after remonstrance by the master, is a good ground of dismissal. A tutor who had used obscene language to the children whom he taught, was held to have been justifiably dismissed, and his salary was declared to be forfeited. (Mathieson v. M'Kinnon, June 4, 1832.)

634. *Family Secrets.*—Maliciously spreading defamatory rumours

ports, or disclosing family secrets, to the prejudice of the master or his family, will justify the dismissal of a servant. (Beeston v. Colyer, 2 C. and P. 609 ; Fraser, 76.)

635. *Trade Secrets*.—It is not uncommon in manufactures for the master to be possessed of a method or “trick,” unknown to other tradesmen, and on which his superiority and fortune depend. The servant, at hiring, is usually bound to secrecy on this subject ; and if he reveal anything on which he has promised to be silent, he may not only be dismissed, but will be liable in damages. (Rutherford v. Boak, Mar. 19, 1836, Jury Sittings.)

636. *The Servant's Earnings belong to the Master*.—During the hours of work, which, in the case of domestic servants, includes all hours not devoted to necessary rest, the servant's time and labour belong to the master. If, therefore, the servant, while hired exclusively to one person, should, without his employer's consent, hire himself to another, all his earnings belong in strictness to the first employer. “Whatever difficulty,” said Lord Ellenborough, “there might be in the master's recovering the earnings of his servants, it seems established that he may retain them when paid into his hands, as he is equitably entitled to them, and his right can least of all be controverted by his servant. The point has been decided in the case of a master of a ship who had given a part of his personal services to one who was not the owner.” (1 Campb. 529 ; Fraser, 98.)

637. A clerk, or servant, may legally inform his master's customers that he is about to commence business on his own account, and solicit their future patronage. (Nicol v. Martin, 2 Esp. 732.) But it would seem that if, while the contract of service is still subsisting, the servant endeavour to get his master's customers to transfer their business to himself, he is liable in damages, and may be dismissed. (Fraser, 89.)

638. *Inventions* by a servant belong to him, unless there is a contract between him and his employer, providing either expressly, or by necessary implication, that inventions by the

servant in the course of his service should belong to the master. (*Broxam v. Elsee*, 1 C. and P. 558 ; *Fraser*, 99.)

639. *The Servant is bound to accompany the Master.*—Where the service has relation to the person more than to the place, the servant, as a general rule, is bound to attend the master wherever he goes. The obligation which thus lies on domestic servants of all ranks does not exist in the case of a ploughman hired to labour on a certain farm, or a workman engaged to work in a particular factory.

640. Even as regards the former class the rule is not without exception. No servant is bound to go to a foreign country, seeing that he is there beyond the protection of British law, and in circumstances, it may be, very different from those under which he would have lived at home. (*Bell's Prin.* 180.) Whether England or Ireland would now be held to be foreign countries to this effect, we must, in opposition to the high authority of Mr. Bell, regard as more than doubtful ; the more so that our law of master and servant scarcely differs from that of England.

641. In case of the servant being carried to England or Ireland, or even to a distant part of Scotland, he would probably be found entitled to the expenses of his journey in returning at the termination of his engagement. Were he dismissed for misconduct, the reverse would probably be the case, as the master might possibly have returned and carried him along with him, before the termination of the engagement. (*Fraser*, 82-4.)

642. *Admonition.*—Where the offence has been slight, though belonging to the class of offences which warrant dismissal, the master is bound in the first instance to try the effects of admonition. If this be slighted, repetition of a very small offence will constitute a grave transgression. (*Bell's Prin.* 183 ; 2 *Hutch.* 167 ; *Fraser*, 72, 114.)

643. *Wages due on Dismissal.*—The general rule is, that

righteous dismissal infers forfeiture of wages. But this rule is one which cannot always be applied with strictness, and the courts have generally been guided by the following principles : Where the cause of dismissal, though sufficient, is light, the servant will be entitled to wages during the time he has served, or part thereof. (*Robinson v. Headman*, 3 Esp. 235 ; *Taylor v. Guthrie*, Hume, 382 ; *Learmonth v. Blackie*, Feb. 13, 1828 ; *Wilson v. Simpson*, July 11, 1844.) On the other hand, if it has been grave—such, for example, as an attempt on the part of a man-servant to debauch a woman-servant, or even deliberate and insolent disobedience to a lawful order—the wages, both past and future, will be forfeited. (*Atkin v. Acton*, 4 Car. and P. 208 ; *Turner v. Robinson*, 6 Car. and P. 15 ; *Silvie v. Stewart*, July 3, 1830 ; *Matheson v. M'Kinnon*, June 4, 1832.) Again, the circumstances may be such as to sanction leniency to the extent of finding wages due for the whole period of the contract, refusing only board wages. (*Gibson v. Pentland*, Nov. 12, 1793, reported from Sess. Pap. ; *Fraser*, 114.) A case in which board wages also were given would scarcely be one for dismissal.

644. A fault, in order to form a bar to wages, must be mentioned at the time ; and the master will not be held entitled to allow the service to be completed, and at the end of it to plead a breach of contract as a defence to the servant's claim for wages. (*Fraser*, 154.)

645. *Forcible Ejection*.—If a servant, when discharged, refuse to quit his master's premises, the master is perfectly justified in turning him out by force. (*Donaldson v. Williams*, 1 Cr. and M. 345.) But in most cases, for obvious reasons, it will be more prudent to call in the aid of a constable or policeman.

646. The master is at all times entitled to dismiss the servant, and to insist on his departure, on paying wages and board wages. (*Cooper*, March 5, 1825 ; *Ersk.* iii. 3. 17, note 117.)

## VI. OBLIGATIONS OF THE MASTER.

647. The master is bound to receive the servant, and to him to continue in his service till the termination of the contract (Bell's Prin. 182.) . He is bound to protect him, and him with patience and moderation ; and if intemperate language or threats of personal violence be habitually used to him, still more, if he be treated with such severity as to destroy happiness or comfort, a court of law will find him entitled to leave the service, and to sue for wages, and in extreme case damages. Even the wanton imposition of unnecessary labour if carried to a great extent, would be held to be a violation of the contract by the master (Ersk. i. 7. 62) ; but it is impossible to assign the point at which the master's judgment would no longer be regarded as the measure of what was necessary and reasonable. Every case of this kind must be determined on its own specialties, and no one decision can form a precedent for another.

648. *Personal Chastisement.*—It was the opinion of Blackstone, and seems to be consistent with our law, that a master may correct an apprentice or very young servant, more especially a male servant, provided it be done with moderation ; if the master or master's wife beats any servant of full age, it is a good cause of departure. (Stephen's Com. ii. 243 ; 2 Black. Com. 211 ; 2 Hutch. 170.)

649. *Attempting the Honour of a Female Servant.*—A female servant is entitled to leave her master's service if he attempts to dishonour her. In such a case the master will be liable for wages and board wages for the whole period of the engagement, and not unfrequently in damages also. (*M'Call v. Miller*, May 14, 1832 ; Fraser, 126.)

650. *Falsely accusing Servant of Dishonesty.*—If the master should fail in proving a charge of dishonesty against the servant, the latter will be entitled to quit the service, and to claim wages.

and board wages for a period which will be regulated by the circumstances of the case. (*Longmuir v. Thomson*, March 16, 1833.) The master's position in regard to such charges, if made at a time when he had a right to speak on the subject, is a privileged one, and the servant will not be allowed to get damages without proving malice. (*Fraser*, 128.)

651. *Food and Lodging*.—The master is bound to supply domestic servants with wholesome food and lodging, suitable to their condition. (*Bell's Prin.* 182.) But even where a particular kind of food has been promised, the master will not be bound to furnish it, or pay the full value, if, from unforeseen circumstances, it has risen to an extravagant price. (*Wilkie v. Bethune*, Nov. 23, 1848.) [On the neglect of the common law obligation is now imposed the statutory penalty of 38 and 39 Vict. c. 86, sec. 6, viz.: "Where a master, being legally liable to provide for his servant or apprentice necessary food, clothing, medical attendance, or lodging, wilfully and without lawful excuse, refuses or neglects to provide the same, whereby the health of the servant or apprentice is, or is likely to be, seriously or permanently injured," he shall be liable to a penalty of £20 or six months' imprisonment. (*Fraser*, 128.)]

652. The master may compel a male servant to reside out of his house on paying for his lodging, but not a female servant, because it is implied in her contract that she shall have the protection of her master's house and family. (*Bell's Prin.* 183; *Graham v. Thomson*, Feb. 12, 1822.)

653. *Medical Attendance*.—There has been no decision of the Supreme Court in Scotland as to the liability of the master to furnish medical attendance; and in cases of ordinary sickness, not arising from the service, and over which he had no control, the leaning of lawyers has been to the effect that he would not be liable. In England it may now be considered as established law, that a master is not bound to provide medical advice for his servants, and that it makes no difference whether or not the

servant be living under the master's roof. The liability lies against the parish officer; an arrangement which is conceived to be more for the advantage of servants, from there being many masters not in such a position as to enable them to afford sufficient assistance in cases of serious illness. (*Wennall v. Adney*, 3 B. and P. 247; *Fraser*, 127.)

654. Where the illness has arisen from a hurt sustained in the service, and the master has sent his own medical attendant, he may be held to have undertaken the care of the servant in that illness, and be liable for the bill of *another* medical man, though in general he will not be bound to pay for one whom the servant has selected without his knowledge, and continues to employ without his consent.

655. *In what case is the Master liable for injuries sustained by a Servant in the discharge of his duty?*

656. The master must conduct his business in such a manner as not recklessly to endanger the lives of his servants; and if he act rashly, and injury follow in consequence, he will be liable to damages.

657. In order to entitle the servant to damages, however, it is necessary that positive misconduct be brought home to the master. (*Sellen and Wife v. Norman*, *Carrington and Payne's Reports*, vol. iv. p. 80; and *Cooper v. Philips*, p. 581.)

658. Where a servant was injured by the breaking down of a carriage, in consequence of a defect of which the master was not aware, he was not bound to make reparation, because "he is not responsible for the negligence of his coachmaker or harness-maker." The master's obligation is discharged when he has provided for the safety of his servant "according to the best of his judgment, information, and belief." (*Priestly v. Fowler*, 3 M. and W.; *Fraser*, 175.)

659. In strict accordance with this principle, it was subsequently held by the House of Lords, overturning several decisions of the Scotch Courts, that a master is not liable in

damages to a servant for injury caused by the negligence of a fellow-servant, if the latter, when selected by the master, was a suitable person for the employment in which he was engaged. (*Bartonshill Coal Co. v. Reid*, June 17, 1858; 3 Macqueen, 266; Fraser, 194 *et seq.*)

660. The principle laid down by Lord Cranworth, and followed by the House, was, that when one workman enters into an engagement in which many other fellow-workmen are employed, he, in general, knows the risk he is exposing himself to; and he knows, moreover, that they are risks of a kind that are more within the immediate control of the servants themselves than of the master. (*Brownlie v. M'Aulay*, March 9, 1860; *M'Intyre*, Dec. 24, 1859; *Gray*, Feb. 8, 1860.)

661. This principle has been greatly extended by recent decisions; and it would seem to be now settled that—circumstance usually occurring in the case of a firm or company carrying on large works—where no fault is directly attributable to the employer, and where he can show that he has chosen a person of knowledge and skill for his subordinate, he is under no responsibility for accidents caused by *any* of his servants, even though the party in fault be a manager to whom he has entrusted the *entire* control of his works. (*Wilson*, 1867, 5 M. 807, and 1868, 6 M. H. L. 84; *Sneddon*, 1876, 3 R. 868; *M'Laughlan*, 1882, 20 S. L. R. 271.)

662. In the most recent decision on the subject, the doctrine was carried to its full length and based on its proper principle. It was there decided that a miner working in the employment of contractors for driving a level in a mine belonging to a company, whose manager and underground manager were in charge of the mine, was not, to the effect of rendering the company liable for his death through the underground manager's negligence, a stranger, in respect that, by becoming a member of the organization of the mine, he had taken the risk of injury from the fault of other members without claim for redress except .

against the person in fault. (Woodhead, 1877, 4 Rettie, 469. In this case it was observed by the Lord President, that in such cases the mine-owner is free from responsibility, "no because the injured and injurer are both his own hired and paid servants, but because he is not personally in fault, and has not warranted the injured workmen against the perils of the work. The ground of liability thus appears to be the personal fault of the owner in selecting an incompetent person, from whose incompetency another person engaged in the same common work has suffered injury, and his liability is the same whether the incompetent person were his own servant or that of an independent contractor.

663. [Such was the state of the law as developed by a quarter of a century of judicial decisions both in Scotland and England since the doctrine was first mooted in *Priestly v. Fowle* (*supra*, sec. 658), until the passing of the Employers' Liability Act, 1880 (43 and 44 Vict. c. 42). This Act, which has given rise to much commentary (*vide* Fraser, M. and S. 215 *et seq.* Sym, "Analysis" of the Act), and whose terms are yet only in course of judicial interpretation, has made an important and extensive alteration in this department of the law, greatly diminishing the master's claims to exemption from liability for injuries caused by one servant to another, on the above ground of "common employment" or "common organization of labour," and greatly amplifying, in the absence of express contract, the claims of the workman to compensation for injuries sustained while engaged in his master's employment. Its provisions properly fall under the head of statute law on the subject, and are considered as such (and in their relation to the common law rules above stated), in the sub-chapter on that head (*infra*, sec. 724).]

664. *Liability of Master for Injury by a Servant to a Third Party*.—The opposite result will follow where the person injured is a stranger. In this case all that is necessary to render the

master responsible is, that it shall be proved that the servant was guilty of negligence, and that he was engaged at the time in the ordinary business of his master, and that the injury arose from something done while acting strictly within the scope and limits of his employment. (*Fraser*, 261 *et seq.*)

665. If the employment in which the servant was engaged be of the nature he was hired to, the master's liability, where such exists, will not be taken away by the fact of his having given no express orders for the special act out of which the injury arose, or his not having been aware of its performance. (*Dougal v. Macartney*, Dec. 18, 1829; *Brown v. M'Gregor*, Feb. 26, 1813; *Baird v. Hamilton*, July 4, 1826; *Attorney-General v. Siddon*, 1 *Crompt. and Jer.* 220; *R. v. Dixon*, 3 *M. and S.* 11.)

666. But if the act was one which the servant was specially ordered not to do, even though lying within the line of his ordinary duties, the master will not be liable for the consequences. (*Linwood v. Hathorn*, May 14, 1817, *H. of L.* March 19, 1821, 1 *Sh. Ap.* 20; *Waldie v. D. of Roxburgh*, March 1, 1822, *H. of L.* Feb. 10, 1825, 1 *W. and S.* 1; *Howie v. Lovell*, June 23, 1826; *M'Laren v. Rae*, Dec. 10, 1827; *Miller v. Harvie*, Dec. 24, 1827.)

667. The same principles apply whether the injury arose from negligence or unskillfulness.

668. But where the damage arose from a wrong wilfully committed by the servant, the master will not be responsible, for no man can be responsible for another man's wrong-doing. On this principle the master will not be liable for trespasses committed by his servants, nor for injuries caused by their passion or intemperance. (*Fraser*, 168; *Bell's Prin.* 2031; *Young v. Colts' Trustees*, June 21, 1832.)

669. A superior will not be responsible for the wrongful acts of an inferior acting in his absence, and whom he has not appointed. Thus, the captain of a man-of-war, or even of a merchant ship, will not be liable for injury caused by an officer

commanding during his necessary or warrantable absence. (*Mitchell v. Stuart*, Feb. 1, 1838; *Nicholson v. Mouncey*, 15 East, 384.)

670. Where a crime is committed with the master's knowledge, or by his command, *both* master and servant are responsible, both civilly and criminally; the principle of the servant's responsibility being, that no man is bound to commit a crime, though commanded by another. (*M'Laren v. Rae*, Dec. 10, 1827; *Miller v. Harvie*, Dec. 24, 1827. See *Manley Smith*, 147 *et seq.*)

671. [*Contributory Negligence.*—When fault is clearly attributable to the master for an injury, either to a person in his own service or to a stranger, he will yet escape liability if he can show that the accident was brought about or materially contributed to, by the rashness or negligence of the person injured. But the fault must be such as to have directly conducted to the injury suffered, and not merely remotely connected with it, and must be clearly established. (*M'Naughton*, 1858, 21 D. 160; *M'Martin*, 1872, 10 M. 411, Lord Neaves; *Fraser*, 184 *et seq.* and 264 *et seq.*) Whether, where a stranger has been injured through the fault of another person's servants, the employer can defend himself on the plea of contributory negligence on the part of the fellow-servant of the injured person, has been decided in Scotland in the negative and in England in the affirmative. (*Adams*, 1878, 5 R. 215; *Armstrong*, 1875, L. R. 10 Exch. 47.) A child of six years has been held capable of contributory negligence, while it would appear that one of four cannot be guilty of it. (*Campbell*, 1873, 1 R. 149; *Fraser*, 1882, 10 R. 264; *M'Gregor*, 1883, *ib.* 725; *Fraser*, 264.)]

672. *Liability of Master for Contract by Servant.*—The master is not bound by a contract entered into by the servant, unless it fall strictly within the limits of his commission. When the servant contracts in his master's name, either in a matter falling wholly beyond his commission, or when exceeding

in degree the powers which he has received, he binds not his master, but himself, either wholly, or to the extent of the excess. (Fraser, 304.)

673. *Obligation to pay Wages or Hire.*—In all cases of service this obligation is presumed on the master's part; and, consequently, an express or implied understanding must be proved before it will be held that the service was gratuitous, or for less than the wages which are usual in the trade or occupation. But if the parties have gone on for some time at a certain rate differing from that of the trade, they will be held to have established an exceptional usage, which, in their case, will overcome the usage of the trade. (Fraser, 134.) Where neither usage of trade nor usage of parties can be proved, the Court will give to the servant what, in the exercise of a sound discretion, they consider to be the value of his services, or they will leave the matter to a jury.

674. Where wages have been fixed by express agreement, no services, however zealous, will entitle the servant to claim an increase over the sum specified, unless they have been of such a nature as to take him out of the contract, or unless he can establish a new contract, express or implied. (*M'Whirter v. Guthrie*, Hume, 760.)

675. *Interest on Arrears.*—The servant is entitled to interest on the arrears of his wages so long as they remain unpaid. (*Mansfield v. Scott*, June 9, 1831, and H. of L. Feb. 18, 1833.) But it is said that, if the wages be not fixed, interest will run only from the date of the decree by which the amount is determined. (Fraser, 138; *Wallace v. Geddes*, June 13, 1821, W. and S.)

676. *Deductions for Damage by the Servant.*—No deductions can be made from the wages of the servant for damage which he may have occasioned, unless it arose from conduct which was culpable, either in the sense of being malicious or negligent and careless. Any accidental destruction of furniture, crockery, or

the like, not attributable to culpable negligence, cannot therefore be founded on as a claim against the servant, unless it can be proved that there was a positive stipulation that the servant should pay for such losses out of his wages. (*Le Loir v. Bristow*, 4 Camp. 134; *Fraser*, 154.) In the case of waiters at inns and taverns, it is not uncommon to provide against such contingencies by insisting that the servant shall lodge a deposit from which all damage may be liquidated.

677. If the period of service has been accomplished without any challenge being made, the master's plea of misconduct in bar of a claim for wages will not be listened to. (*Tait v. McIntosh*, Feb. 26, 1841.)

678. *Payments and Presents to Servants during the Engagement.*—Money given by the master to the servant during the period of service will not be allowed to be deducted from the wages, unless such appear to have been the understanding of the parties. Such sums will be regarded as presents, and more especially so if the servant be a minor, or if the object was the purchase of what were not strictly necessities. Thus, a master having advanced money to his servant girl to purchase a silk dress, it was held that he could not deduct it from her wages; and the same was the case with money paid for coach fares for the servant's mother. (*Hedgeley v. Holt*, 4 Card. p. 104.) So, also, jewels given to a servant will be regarded as presents, whereas ordinary clothes may be stated as payment *pro tanto* of wages, more especially in those cases of implied contract where no wages have been expressly stipulated or agreed to. (*Fraser*, 152.)

679. *Hiring by an Overseer or other Agent.*—The question of wages will not be affected by the fact that the hiring was not by the master personally. If the agent was capable of contracting for the principal, he was capable of binding him for the amount of wages that he agreed upon. (*Narbonnie v. Scott*, Hume, p. 353. See *Wife*.)

680. *When Wages must be paid.*—In the case of domestic servants the custom is for wages to be paid half-yearly, whatever may be the period of service agreed on; and, in the absence of positive stipulation, they will be due accordingly. With regard to other servants equally, the matter will be regulated by custom, though in their case it is less consistent. (Ridgway, 4 N. and M. 797; *Mansfield v. Scott*, Feb. 17, 1833, W. and S.)

681. *Clothes and Livery.*—It forms no part of the master's obligation to find clothes or livery for the servant; and though he agree to do so, the clothes will not be held as part of the wages, but will remain the property of the master, and there is no distinction between plain clothes and livery. (*Shiels v. Dalziel*, July 2, 1825.)

682. *Servant's Lien for his Wages.*—A workman may retain materials which have been put into his hand for the purpose of executing a piece of work, till payment be made to him of the expense which he has disbursed on it, and of the value of the workmanship which he has expended. But if the workman yield up possession of the subject by delivering it to the party who employed him, his right of retention is at an end, even though he should afterwards recover the possession. If the material remains in the premises of the master, there is no lien, because the workman never obtained possession. (Ersk. iii. 4. 21; *Bell's Prin.* 1415, 1420; *Fraser*, 151, 152.) [An ordinary servant, living in his master's house, has no such lien, for his possessions is his master's.]

683. *Arrestment of Wages.*—Servants' wages, in so far as they are alimentary—that is to say, in so far as they are necessary for a suitable aliment during the current term—are not arrestable; but arrears and excess over a suitable aliment may be arrested. (Ersk. iii. 6. 7; *Stair*, iii. 1. 37.) This rule applies to remuneration for all sorts of service. It has been found to apply to a professor's salary (*Laidlaw v. Wylde*, M. App.; *vide*

Arrestment, p. 4), to that of the rector of an academy (*Murray v. Bell*, May 16, 1833), of a pursuivant-at-arms (*Moinet v. Hamilton*, Feb. 2, 1833), and no doubt would apply to that of a judge of the Court of Session (see, however, *Ersk.* p. 732, Ivory's edition), or a member of the Administration. The amount necessary for a suitable aliment will be determined entirely by the peculiar circumstances of each individual case. Now, by 33 and 34 Vict. c. 63, the wages of "all labourers, farm servants, manufacturers, artificers, and workpeople" are not arrestable, except (1) in so far as they exceed twenty shillings per week; but the expense of the arrestment is not to be charged against the debtor unless the sum recovered exceed the amount of the said expense; or (2) under decrees for alimentary allowances and payments, or for rates and taxes imposed by law.

684. *Prescription of Wages.*—Servants' wages fall under the triennial prescription; or, in the words of the statute, "unless he pursue within three years, the creditor shall have no action, unless he either prove by writ or by oath of the party," i.e. the defender. (Stat. 1579, c. 83.)

685. This Act applies to servants of all kinds—to superior as well as to inferior servants. (*Robertson v. Marquis of Annandale*, 1 Cr. and Stew. 293; *M'Dougall v. Campbell*, June 22, 1830, H. of L. August 27, 1833.) If no period has been fixed for payment of the wages, the prescription runs from the termination of the services rendered, when the wages are held to have been due.

686. Unless there be a positive stipulation to the contrary, the wages of every year or term run a separate prescription; and this, although the hiring should have been by written agreement, and for a series of years. (*Ersk.* iii. 7. 17; *Fraser*, 156.)

687. The prescription is pleadable after the master's death by his heir. (*Ritchie v. Little*, Jan. 15, 1836.)

688. *Death of Master or Servant.*—If the servant die before the term, wages are due to his executors for the period he has

served. If the master die before the term, full wages up to the term are due; and if the time for giving warning have expired, wages, and in some cases board, are due to the servant for another term. The master's executor may, however, claim the services of the servant. (Bell's Prin. 179, 186; Ersk. iii. 3. 16.)

689. *Competition between Servants and Creditors.*—The right of the servant to wages is one of the privileged debts recognised by the law of Scotland; and as such entitled to a preference in competition with ordinary debts. This privilege was confined to farm and domestic servants; and the rule was construed so strictly as to exclude, on the one hand, carpenters and smiths, though doing work on a farm during the year at a slump sum (Fraser, 144 *et seq.*); and, on the other, clerks, oversmen, mashmen in a distillery, artisans employed in the establishment, and the like. By 38 and 39 Vict. c. 26, repealing 19 and 20 Vict. c. 76, sec. 122, it is provided that "the wages of clerks and shopmen and servants employed by the bankrupt shall be entitled to the same privilege as the wages of domestic servants to an extent not exceeding four months' wages prior to the date of sequestration being awarded, or where sequestration is not awarded, prior to the concurrence of diligence for distribution of the estate of a party being notour bankrupt, and not exceeding the sum of fifty pounds; and the wages of workmen employed by the bankrupt shall be similarly entitled to an extent not exceeding two months' wages prior to the same respective dates."

690. *Giving a Character.*—However long and faithfully the servant may have served, the master is not bound, at the close of his service, to testify to his honesty, sobriety, or skill. (Fell v. Lord Ashburton, Dec. 12, 1809, F. C.) The duty of giving a character being one which, however binding in morality, it has not been found convenient to enforce by positive law. (Fraser, 129.)

691. But, if given, the character must be strictly true; in which case the master will be held perfectly justifiable, even though it be prejudicial. (Bell's Prin. 188; Fraser, 130.) Such a character, however, must in general be asked for, as the master is not entitled needlessly and ultroneously to publish his servant's infamy (*Christian v. Kennedy*, July 6, 1818); and in that case, it will be for the servant to prove its falsehood, not the master to prove its truth. But there are cases in which the master would be fully justified in stating, unsolicited, facts to the prejudice of his servant, though, in doing so, he might undertake the obligation of proving them. "I do not mean to intimate," said Lord Alvanley, "that if a servant were strongly suspected of having committed a felony while in the master's service, that master is not at liberty to warn others from taking him into their service." (*Rogers v. Clifton*, 3 B. and P. p. 592.) Where an action of damages is raised by the servant in such a case, it will be a question for the jury whether the defendant acted *bona fide*, with the intention of communicating facts which the other party ought to know, and honestly intending to discharge a duty, or whether he has acted maliciously, and simply for the purpose of injuring the servant. (*Pattison v. Jones*, 8 B. and C. 584.)

692. If the character, whether solicited or unsolicited, be false, the master will be liable in damages to the servant; the falsehood being held to imply malice. (*Anderson v. Wishart*, July 13, 1818.) Even if true, the character, if prejudicial, must not be more so than the circumstances render necessary. (*Fountain v. Brodie*, 2 Gale and Davidson, 455.) Acts of petty dishonesty, such as are too common amongst servants, will not entitle the master to brand the servant as a thief. The safe course in such circumstances is to state the offence, and not to apply to it a *nomen juris* which may possibly convey an erroneous impression as to its magnitude. (Fraser, 131.)

693. *Damages for giving false Character in the Servant's*

*Favour.*—There is reason to fear that, partly from thoughtless good nature, and partly from a selfish desire to get rid of a bad servant without the annoyance of a dispute, false characters are given in favour of servants very much more frequently than to their prejudice. It is desirable that masters and mistresses should keep in mind that they may render themselves liable in reparation of any damage which can be shown to be the direct result of thus perpetrating on a stranger a wrong which is manifestly within the reach of the common law. (*Pasley v. Freeman*, 3 T. R. 51; *Foster v. Charles*, 6 Bing. 396; *Fraser*, 132.) By 32 Geo. III. c. 56, heavy penalties are imposed on the makers of false certificates to servants, as well as on servants using them. The penalties may be recovered before any two justices of the peace, on the oath of one witness. One half goes to the poor, and the other half to the informer; and, failing payment, the offender may be imprisoned for three months. (*Fraser*, 133.)

694. *Is the Master entitled to assign the Servant to another?*—Where the nature of the service is such as to render a choice of person (*delectus personæ*) of the essence of the contract, the master cannot assign the servant to another, nor give to a new master a right to his services along with himself. He cannot, by assuming a partner, give him the rights of a master over a domestic servant, a governess, or even a clerk. It is part of the agreement that the servant shall do the work of the master who hires him, and of him alone. (*Harkins v. Smith*, March 11, 1841, F. C.; *Fraser*, 122.)

695. The case of artisans is different. The assumption of a partner in trade is so ordinary an occurrence, that it is regarded as a contingency contemplated by the contracts into which tradesmen enter, and consequently will not free their servants. But if the original master quits the firm, it would seem that the servants are not bound to remain. (*Fraser*, 122, 123.)

696. Where the original engagement was with a company or

corporation, there never was an individual master at all ; and therefore, whilst the place, the time, and the nature of the employment remain unaltered, the servant will not be freed from his contract by an entire change of the partners. But even companies cannot assign their servants to other companies or individuals. (*Edinburgh Glass Co. v. Shaw*, M. 597.) There is a distinction also between a case in which the contract is terminated by a voluntary act of the master, and one in which its termination arises from circumstances over which he had no control. Servants who would not be bound to transfer their services in the former case will often be bound to do so in the latter. (*Fraser*, ib.) Where, for example, a master dies, his domestics will be bound to continue till the termination of their engagements in the service of whoever may become the head of his family, and to yield him the same obedience and respect as if he had been their original master.

697. *Termination of the Contract by Master's Death or Bankruptcy.*—In these, as in all other cases where the contract has been dissolved from circumstances which were beyond the master's control, the damages to the servant will be restricted to the smallest possible amount. Wages will be given till the next term only, though the contract may have been for years ; and the servant is bound at once to look out for other employment, should the executor not require his services, on procuring which his claim for wages from his former master will cease. In claiming the full fee for the current term, it will be incumbent on him to show that he used due diligence to obtain another engagement, and that he was unsuccessful. (*Bell's Prin.* 187, 188 ; 2 *Hutch.* 166 ; *Puncheon v. Haig*, M. 13990 ; *Fraser*, 326, 327.)

698. *The Servant is not bound to return when improperly dismissed from the Service.*—It will not be a competent defence to the master against a claim for damages by the servant, to offer to receive him again into his employment if he has been impro-

perly dismissed. The contract, once broken, cannot again become a binding engagement without the consent of both parties. (Fraser, 140; Ross, 1874, 1 Rettie, 352.)

699. *Damages for enticing Servant to leave.*—A master is entitled to damages from a third party who, in knowledge of a subsisting engagement, entices a servant away from his service. The rule is of importance in manufacturing districts, where the possession of many hands at particular moments is often an object of so much urgency as to occasion rivalry amongst employers. ([Couper, 1879, 6 R. 683]; Fraser, 161.)

#### VII. TERMINATION OF THE CONTRACT.

700. *Warning.*—When no warning has been given by either party, a renewal of the contract by tacit consent will be presumed, unless the presumption be excluded by a well-established local practice. The terms of the original agreement are those which regulate the renewed contract, except the time. Tait v. Mcintosh, Feb. 26, 1841.) And the time will be determined by the length of the previous engagement, and the presumption in law applicable to the particular kind of service. Where the original engagement was in writing, and for more than a year, the renewal will be only for one year, as a tacit cannot exceed a verbal contract. (Fraser, 59 *et seq.*) [The rule of tacit relocation is founded on custom, and does not apply to a contract of service where no such custom exists, as *e.g.* to a workman's contract for a specified period. In such case the agreement itself contains the warning. (Lennox, 1880, 8 R. 38.)]

701. There is no formal style of warning. In practice it is almost always verbal, and it is not necessary that it should even be in express words. If a gentleman tell his coachman that he is not to keep a carriage after Whitsunday, that is sufficient notice to the coachman that his services will not be required after that time. On the other hand, the servant, by entering

into a contract, the performance of which is incompatible with the further discharge of his duty to his master, is held, by intimating the new engagement to the master, to give sufficient notice of his intention to quit. Enlistment on the part of a male, or marriage on that of a female servant, may be mentioned as examples. (*M'Donnell v. Dixon*, M. App. Mut. Cont. 3.)

702. It has been said that warning must be given forty days before the termination of the contract (*Fraser*, 60); but, though in some districts this may be required by custom in the case of servants engaged for lengthened periods, it certainly would not be requisite anywhere, if the engagement was from month to month. In such a case, a month's warning, in accordance with the English practice, would be a sufficient answer to any claim for damages on either side, or even fourteen days where such was the practice. (*Burton*, Private Law, 254.)

703. *Time to look out for new Place*.—A servant, after having given or received warning, is entitled to a little liberty to look out for another situation. Without this the object of the warning would be defeated; and there can be no doubt that, by refusing it altogether, the master would render himself liable in damages to the servant. On the other hand, the servant must make those needful inquiries at the time and in the manner that will least incommode his master or his family. If the master has fixed an hour when it is possible for him to accomplish his object, he must take that hour and none else. (*Fraser*, 81, 117; *R. v. Potter Hergham*, Burr S. C. 690.)

704. *Old and New Style*.—Where there is neither covenant nor uniform and notorious usage to the contrary, the commencement and termination of the contract will be regulated by the new style.

705. *Servant's Obligations to depart and deliver up Property*.—Where the servant has been dismissed, the master may expel him from his house or premises, and treat him like any other trespasser if he refuse to depart. Even though the dismissal be

illegal, and though the servant should ultimately be found entitled to damages, he will not be justified in remaining in his situation in opposition to the commands of the master. (*Ante*, *seca* 645, 646; Burn, Justice, p. 851; Fraser, 331.) The case might be different if the dismissal, particularly of a female servant, were to take place during the night, in a foreign country, or in circumstances which rendered departure dangerous or impracticable.

706. The servant is bound to quit any separate premises which he may have occupied as servant, without receiving the notice to which he would have been entitled as tenant, and he must also deliver up all the property of his master of every kind which may be in his possession. It has been doubted whether this rule would apply to ground which he has put under crop, or a garden which he has stocked with vegetables. But the case of *Scougal v. Crawford* (2 Mur. 110, quoted by Mr. Fraser, 332) does not seem to bear out the doubt, and it is not supported by the law of England. (*Bertie v. Beaumont*, 16 East, 34.)

#### VIII. STATUTE LAW RELATIVE TO THE CONTRACT OF SERVICE.

707. It has been chiefly in the departments of manufacturing and agricultural labour that the provisions of the common law have been found insufficient to regulate the relations of master and servant; and the enactments which have been framed with a view to supplying this defect, have had reference to the circumstances of England more especially. The prior statutes on the subject were, with some insignificant exceptions, wholly repealed by the "Conspiracy and Protection of Property Act, 1875" (38 and 39 Vict. c. 86), and a new form of procedure in disputes between master and servant was provided by the "Employers and Workmen Act, 1875" (38 and 39 Vict. c. 90). The former of these Acts is a penal statute which imposes severe penalties on conspiracy and intimidation by workmen arising out

of trade disputes and strikes, particularly against employees in gas or water works.

708. The last-mentioned Act (3) empowers the Sheriff in any dispute between an employer and a workman to (a) set off claims on the part of either against the other; (b) to rescind the contract [(see Wilson, 1878, 5 R. 981)] with such an apportionment of wages or damages as he may deem just; or (c) in lieu of giving damages for breach of contract, with the complainer's consent to accept security on an undertaking by the respondent, and one or more cautioners, to implement the contract and to order performance.

709. (4.) Procedure may be summary where the sum in dispute as wages or damages does not exceed ten pounds; and no order for payment, exclusive of expenses, shall be made, nor security required beyond that sum.

710. (5, 6, and 7.) Jurisdiction is to be summary in disputes between master and apprentice, with the same power to the Court as between employer and workman—either to order the apprentice to perform his duties or rescind the apprenticeship, and, in the former case, to imprison him if he fails to do so within one month after the order. The Court may also call the person liable for the good conduct of the apprentice, and give damages against him for the latter's breach of contract, or accept security for his performance thereof instead of, or in mitigation of, punishment.

711. (8.) Security may be given by oral or written acknowledgment according to the rules of the Court in force for the time, and the Court may order payment of any sum so due.

712. (9.) No dispute under the Act is to be deemed a criminal proceeding. All powers conferred by the Act are to be in addition to, and not in derogation of, those already belonging to the Sheriff in summary procedure, except that warrants for apprehension for failing to appear are only to be issued against apprentices, and orders for payment are not to be enforced by imprisonment except as provided by the Act; nor goods taken

by distress otherwise than by an ordinary execution. Power is reserved to the Court of Session by Act of Sederunt at any time to alter the rules of procedure under the Act.

713. (10.) "Workman" does not include domestic or menial servant, but means "any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour," of any age, is working under a contract express or implied, oral or written, whether a contract of service or a contract personally to execute any work or labour. [It includes a tramway conductor (Wilson, 1878, 5 R. 981); while in England (*per contra*) an omnibus conductor, paid daily wages, has been held not a workman. (Morgan v. London Gen. Omnibus Co., 12 Q. B. D. 201.) The Act was (sec. 13) expressly declared not to apply to "seamen or apprentices to the sea service;" but this provision was repealed by sec. 11 of 43 and 44 Vict. c. 16, and seamen and sea apprentices put under its provisions also, while the repealing enactment was declared not to affect any other Act (*e.g.* the Employers' Liability Act) in which "workman" was defined by reference to the 13th section. (See Oakes, 1884, 11 R. 579.)]

714. (12 and 13.) In as far as it relates to apprentices, the Act is only to apply to an apprentice to the business of a workman defined by the Act where no premium is paid, or where the premium does not exceed twenty-five pounds, and to an apprentice under the Poor Law; and is not to affect any local or special jurisdiction touching apprentices.

715. *Wages must be paid in current coin.*—There are two statutes—1 and 2 Will. iv. c. 36, and 1 and 2 Will. iv. c. 37—the object of which is to prevent the very objectionable practice by masters of keeping stores, and paying their workmen by allowing them to run up accounts for provisions, with which they supplied them, of an inferior quality, and at an extravagant price.

716. By the second of these statutes it is provided that all contracts of hiring with artificers must be in the current coin of

the realm, and that there must be no stipulations as to the man in which the wages shall be expended. All wages are to be paid in coin; it being declared that the servant may receive "the whole, or so much of the wages as shall not have been actually paid to him by his employer, in the current coin of the realm." It is further provided, that no employer shall have action against his artificer for goods supplied to him on account of wages. Penalties not exceeding ten nor less than five pence for the first offence, are imposed; and though it is provided that one partner shall not be liable in person for the offence of a copartner, the partnership property is to be so liable. The servants entitled to be paid according to the provisions of the latter statute are, (1) persons engaged in the *manufacture* of iron or steel; (2) in working or getting coal, ironstone, limestone, salt rock; (3) in or about the working or getting of stone, slate or clay; (4) in preparing salt, bricks, tiles, or quarries; (5) what may, for the sake of brevity, be called the manufacture of ironmongery goods; (6) in the woollen, linen, flax, mohair, and similar manufactures; (7) in making or finishing glass, china or porcelain; or (8) in the lace manufacture.

717. It is expressly provided by this statute, that "nothing herein contained shall extend to any domestic servant or servant in husbandry."

718. As exceptions to the general enactment, the employer is allowed to supply medicine or medical attendance, fuel, materials, tools or implements, and food to be consumed by his employed in the trade. He may let a tenement to the artificer or supply him with victuals dressed and consumed under his roof. Another exception is to the effect that the employer is not to advance money, to be contributed by the artificer to a savings bank or friendly society, for his relief in sickness or for the education of his children.

719. *Arbitration between Master and Workmen.*—The dispute for the determination of which by arbitration provision has been

made by the Legislature, are the following : 1st, As to the price of work, whether arising as to payment of wages, hours of work, injury done to the work, delay in finishing it, or bad materials ; 2nd, As to expense which may have been occasioned to the workmen by the purchase of new implements, required for the execution of a new pattern ; 3rd, As to the dimensions and quality of goods ; 4th, As to remuneration for pieces of extraordinary length ; 5th, As to various matters connected with the cotton manufacture ; 6th, All disputes generally arising out of the particular trade or manufacture, and which cannot be otherwise determined ; and 7th, Disputes between masters and persons engaged in sizing or ornamenting goods. (Fraser, 395 *et seq.*)

720. All these disputes may be referred to any justice of the peace, or other magistrate, by a writing under the hands of the master and workmen, for his summary and final determination ; and if the parties do not agree to such reference, either of them is entitled to complain of the other's refusal ; in which case the magistrate may summon the party refusing to appear before him. Should he fail to appear, or to remove the cause of complaint, the justice may then be called upon to propose a list of referees, consisting of from four to six in number,—one half being masters, agents, or foremen, and the other half workmen ; the master choosing one of the former, and the workmen one of the latter half. (5 Geo. iv. c. 96, sec. 3.) If the arbiters cannot decide in three days, the matter reverts to the magistrate, whose decision is final. If any or either of the persons so proposed by the said justice shall refuse or delay to accept the arbitration, or accepting, shall not act therein within two days after such nomination, the justice shall proceed to name another person or persons of the same description ; but if one of the second referees do not proceed to act within twenty-four hours after his appointment, the other may finally determine the dispute, and his decision shall be binding. It rather appears that the justice

may proceed making nominations of referees until some one accepts and acts. (Fraser, *ut sup.*)

721. The Acts further provide for the enforcement of any other method of arbitration which the parties may agree to adopt.

722. The leading enactment on this subject is 5 Geo. iv. c. 96 (June 21, 1824); which is supplemented by 7 Will. iv. and 1 Vict. c. 67, and 8 and 9 Vict. c. 128; the latter having reference to silk-weavers exclusively.

723. The Act 30 and 31 Vict. c. 105, while not repealing these statutes, "in order better to facilitate the settlement of disputes between masters and workmen," makes provision for equitable councils of arbitration and conciliation. The leading provisions of this Act are: (1.) Any number of masters and workmen, being inhabitant householders of any kind of house or part of a house, may,—provided, in the case of a master, he have carried on his trade in the same district for six months previous, and in the case of the workman, he have resided there for the like period, and have worked at his trade or calling for seven years previous,—at a meeting specially called, agree to form a council of conciliation and arbitration, and may jointly petition Her Majesty to grant them a licence to form the same, with all the powers possessed by referees, in virtue of the Acts mentioned in the text. (2.) The number of the council, the names, occupations, and residence of the petitioners, must be set forth, and the manner in which the expenses of the council, etc., are to be provided for. (3.) Provided notice of the petition has been given in the *London Gazette*, and in one or more local newspapers, Her Majesty or the Home Secretary may grant licence to form the council. (4.) The council shall not consist of less than two masters and two workmen, nor more than ten masters and ten workmen, with a chairman. The petitioners shall elect the first council. The council has power to appoint its own officers, and to hear and determine all disputes between masters and workmen

submitted to them by both parties. (5.) The decree of the council is final, and can be enforced in terms of the said Acts. [The law on the subject was still further extended by the Arbitration (Masters and Workmen) Act, 1872 (35 and 36 Vict. c. 46). It prescribes further facilities for the reference of disputes between master and workmen, and extends the class of cases to which arbitration may be applied to the inclusion of (what was expressly exempted from 30 and 31 Vict. c. 105) questions "as to the rate of wages to be paid, or the hours or quantities of work to be performed." (Fraser, 395 *et seq.*)]

[*The Employers' Liability Act, 1880.*

724. [The important bearing of this statute (referred to *supra*, 663) on the relations of employer and workman renders it necessary to give its main provisions in some detail, though space forbids almost anything in the shape of explanatory comment upon them.

725. [The primary intention of the Act is to place the workman, as regards claims for compensation against his employer, in respect of injuries sustained by him through the fault of a fellow-workman, in a like position to any other member of the public who was at the place where, at the time when, he met with the accident, on lawful business. It came into operation on 1st Jan. 1881, and is to continue in force for seven years.

726. [It enacts that a workman "shall have the same right of compensation and remedies" against his employer as if he had not been a workman, where he has sustained personal injury—

(1.) "By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer." A master has been found liable in England under this section where the machine, though not actually defective in its construction, was, under the circumstances in

[which it was used, calculated to cause injury to those using it. (*Heske v. Samuelson*, L. R. 12 Q. B. D. 30.)

[(2.) "By reason of the negligence of any person in the service of the employer who has any superintendence (*infra*, sec. 730) entrusted to him whilst in the exercise of such superintendence." It has been held in England to make no difference that the superintendent was at the time of the accident himself voluntarily engaged in manual labour. (*Osborne v. Jackson & Todd*, 11 Q. B. D. 619; and see *Bunker v. Midland Ry. Co.*, 47 L. T. 476.)

[(3.) "By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed."

[(4.) "By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or byelaws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf."

[(5.) "By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway." Under this section it has been held in England that a steam-crane which can be so used as to propel the truck on which it stands along a line of rails is not a "locomotive engine" (*Murphy v. Wilson*, 52 L. J. Q. B. 524); and also that "railway" is not confined to railways belonging to railway companies, but includes also private lines, *e.g.* a line laid down by a contractor (*Doughty v. Firbank*, 10 Q. B. D. 358). As to the interpretation of "person in charge or control of points," see *Gibbs v. Gt. West. Ry. Co.* (11 Q. B. D. 22, and 12 Q. B. D. 208); and of "in charge of a train upon a railway," *Cox v. eosd.* (9 Q. B. D. 106).

727. [It is thought that the intention of the Legislature was, under the second sub-section above quoted, to make the employer liable for the negligence of a general superintendent appointed

himself; under the third sub-section for that of a special attendant in some particular department or work; and the latter clause of sub-sec. 4 for that of a person in his entrusted by the employer with a particular order to the man (either alone or along with others) who has been injured.

["In case the injury results in death," the claim, which otherwise have been competent to the workman only, passes session to his personal representatives. This transmitted distinct from that which belongs, at common law, to a class of persons, namely, a husband, widow and children, or direct descendants, who may sue in case of the death of a relative, not as personal representatives, but in respect of injury suffered by themselves in the death of the person killed. "personal representatives" of the workman under the Act limited to near relations. They do not sue in respect of injury to themselves, but merely pursue a claim which was sent to their author, and has passed to them as his heirs. (Fraser, 218.)

[But the large provisions of sec. 1 are materially qualified by those of sec. 2, which enacts that the workman's claim to compensation under the first sub-section shall be cut off unless the injury arose from, or was not discovered or remedied owing to the negligence of the employer himself or of some one entrusted with the duty of seeing that the works, ways, etc., were in proper condition; under the fourth sub-section, unless the injury resulted from a defect in the rules, bye-laws, or instructions therein mentioned; and in any case, where the workman knew of the defect or negligence failed to inform the master or superior workman of it, unless where he was aware that the employer or superior workman already knew of it. Where a bye-law has been approved by a Secretary of State or by a Minister of Trade under an Act of Parliament, it cannot, in proceedings raised under the Act, be held to have been improper or oppressive.

730. [The Act defines the "person who has superintend entrusted to him" as "a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour" (see *Shaffers v. Gen. Steam Nav. Co.*, L. 1 Q. B. D. 356), and "workman" as "a railway servant and person to whom the Employers and Workmen Act, 1875 applies." The Act, therefore, has no application to domestic menial servants, or to seamen or apprentices to the sea service who are expressly exempted from the operation of the Act of 1875 (*supra*, sec. 713), nor to any servants who are "engaged in manual labour," except where these are railway servants, who are provided for in sub-sec. 5 of sec. 1 as a new class without any limitation to "workmen" in the sense of the Act. The benefits of the Act extend therefore to railway clerks, guards, stationmasters, and other railway employees whatever kind. It has been decided that a fireman on board a barge propelled by steam plying exclusively on a canal is a "seaman" but a workman, and therefore entitled to the benefits of this Act. (*Oakes*, 1884, 11 R. 579.)

731. [The amount of compensation recoverable under the Act is limited to a sum equal to three years' wages in the employment at which, and in the district in which, the injured workman was working at the time of the accident for three years preceding the accident (sec. 3).

732. [The workman's claim is lost if (1) notice of the injury has not been given to the employer within six weeks; and (2) the action has not been raised within six months, or in case of death within twelve months, from the date of the accident. In the latter case it is within the discretion of the judge to maintain the action if he be of opinion that the omission to give notice was reasonably excusable (sec. 4). The notice must be in writing. (*Moyle v. Jenkins*, 1881, L. R. 8 Q. B. D. 116; *v. Millwall Dock Co.*, *ib.* 482.) It must give the name and address of the person injured, and state "in ordinary language

*Stone v. Hyde*, 9 Q. B. D. 76) the cause of the injury and date, and must be served on the employer in one or other of the ways prescribed in the Act. No defect or inaccuracy in the statement shall affect it unless the judge be of opinion that the workman is thereby prejudiced in his defence, or that it was for the purpose of misleading (sec. 7). On the construction of "defect or inaccuracy," see *Stone v. Hyde*, *supra*; *Clarkson v. The Glasgow and South Western Ry. Co.*, 9 Q. B. D. 386. Omission of the date of injury has not yet been deemed to be a "defect or inaccuracy" within the meaning of this clause, and therefore not such as to invalidate the notice. (*Carter v. Drysdale*, 12 Q. B. D. 91.)

1. [Should the workman or his representatives be entitled to payment of any penalty under any other Act (*e.g.* under sec. 82 of the Factories Act, for neglect to fence machinery, or under sec. 3 of the Coal Mines Regulation Act), the amount thereof to be deducted from the compensation recoverable under the Act (sec. 5).

2. [Actions must be brought in the first instance in the Sheriff's Court (sec. 6).

3. [It is the opinion of Lord Fraser (M. and S. 173), and has been acted on in practice, that the Act does not interfere with the right of the workman to bring his action if so advised at common law in the old form, disregarding the Act, or where the right to sue under the Act has been lost by failure to give notice of the action in due time. He may then bring his action in the Sheriff's Court of Session any time within forty years, and claim compensation to any amount he chooses. If he elect so to bring his action at common law, he will of course be liable to be met by the old common law defence of "common employment" (*supra*, sec. 658 *et seq.*). If there be one against which this defence would not be available, it would seem to be his interest to sue at common law rather than under the Act. (See *Morrison*, 1882, 10 R. 271.)

4. [It would appear that the defence of contributory (*supra*, sec. 71) negligence to actions under the Act is still open to the

[master, apart from the special provisions in that direction in the Act, since it would have been available to him against a member of the public to whose position it is the object of the Act to assimilate that of the workman ; and observations to this effect were made by the judges in an English case. (*Stuart v. Evans*, 49 L. T. 138.)

737. [The repeal of part of section 13 of the Employers and Workmen Act by section 11 of the Merchant Shipping Act of 1882 does not affect its incorporation in the Employers' Liability Act, in whose provisions seamen and sea apprentices have therefore no share. (*Oakes, supra*, sec. 730.)

738. [It has been held in England that it is competent for a workman, and not contrary to public policy, to contract with his employer on entering his service, that he will not in case of injury seek to avail himself of the provisions of the Act ; and the widow of a workman whose death has resulted from an accident while working in his employer's service has been held bound by such an agreement. (*Griffiths v. E. of Dudley*, 9 Q. B. D. 357.)]

*Restrictions on the Employment of Women and Children in  
Factories, etc.*

739. The low rates at which the labour of women and children may be obtained, having led to their employment in various branches of manufacture to an extent and under arrangements which were hurtful both to health and morality, various attempts have been made to mitigate the evil by legislation. The legislation on this subject is now contained in the "Factory and Workshop Act, 1878" (41 Vict. c. 16). It repeals the previous series of Factory Acts, whose provisions it consolidates and amends. No woman, young person, or child may be employed—except under the special provisions of the Act for overtime and night-work—in a 'factory or workshop at any other time than between six and six, or seven and seven,

and never after two o'clock on Saturdays, nor for longer than five hours without a meal. Children may be employed in alternate forenoon and afternoon sets, or on whole alternate days, but never in two sets or on two days continuously. In textile factories the hours are shorter than in non-textile factories and workshops. Meal-times—where no special exception is made by the Act (see third schedule, part 2)—must be simultaneous; and no child, young person, or woman is allowed to remain on the premises during meal-times. Notice of the time fixed for meals, and the mode in which children are to be employed in it, must be posted up in the factory or workshop; and no change may afterwards be made on such regulations without notice to the inspector, and not oftener than once a quarter, except on special cause shown. No child may be employed under ten years of age, and no child, young person, or woman on Sunday. The Act also provides for holidays, and for the attendance of children at school; and makes special provisions for health in special factories and workshops; and prohibits altogether, or to a limited extent, the employment of children or young persons in certain manufactures. It contains also rules for overtime and night-work.

740. [The "Children's Dangerous Performances Act, 1879," imposes penalties on any person employing children under the age of fourteen in any performance "whereby in the opinion of a Court of Summary Jurisdiction the life or limbs of such child shall be endangered," as well as on the parents or guardians aiding or abetting in such performance; and renders the employer, in the case of accident to a child so employed, liable to a criminal charge for assault, and in compensation, not exceeding £30, to the child. The burden of proving the child not to be under the age of fourteen lies on the person charged with the offence. (42 and 43 Vict. c. 34.)]

*Combinations among Workmen.*

741. [The law on this subject is now regulated by the Conspiracy and Protection of Property Act, 1875 (38 and 39 Vict. c. 86), which repealed the earlier Act of 34 and 35 Vict. (c. 32). It is provided that no agreement or combination to do any act in furtherance of a trade dispute between employers and workmen is indictable as a conspiracy unless the act, if done by one person, would have been punishable as a crime, but that provision is not to exempt from punishment any persons guilty of a conspiracy punishable by statute (sec. 3). Workmen in gas or water works who, either singly or in combination, wilfully and maliciously break their contract of service, in the knowledge or belief that by their doing so the supply of gas or water will be cut off, are liable in a penalty of £20, or three months' imprisonment. (4) The same penalty is imposed on workmen, singly or in combination, knowingly breaking their contract so as to endanger human life or cause serious bodily injury, or so as to expose valuable property to destruction or serious injury. (5) "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority—(1) uses violence to or intimidates such person or his wife or children, or injures his property; or (2) persistently follows such person about from place to place; or (3) hides any tools, or clothes, or other property owned or used by such person, or deprives him of, or hinders him in, the use thereof; (4) watches or besets the house or other place where such other person resides or works, or the approach thereto; (5) follows such other person with two or more other persons in a disorderly manner in or through any street or road," is liable in a like penalty. But "attending at or near" a house or workshop merely to obtain or "communicate information" is not watching or besetting. (Fraser, 422 *et seq.*)]

742. *Trade-unions.*—By 34 and 35 Vict. c. 31, trade-unions are declared not to be illegal by reason merely that they are in restraint of trade. The Act defines trade-unions, and excludes from their operation agreements between partners as to their own business, or between employers and employees as to such employment, or in consideration of the sale of the goodwill of a business, or of instruction in any trade or handicraft. But no Court can entertain a proceeding arising out of disputes between the members of a trade-union, or between one trade-union and another. A union may hold property vested in trustees, as the Act directs; and any member obtaining fraudulent possession of moveable effects of the society may be prosecuted by the procurator-fiscal or the trade-union with his concurrence. To acquire legal recognition the union must be registered, and must conform to certain rules as directed by the Act. (Fraser, 352; McKernan, 1874, 1 R. 453; Shanks, ib. 823.)

*Seamen.*

743. In the Merchant Shipping Act (17 and 18 Vict. c. 104), the Merchant Shipping Amendment Act (18 and 19 Vict. c. 91), the Passengers Act (18 and 19 Vict. c. 119), and others of minor importance, we now possess a code of mercantile legislation tolerably complete, and far too minute and complicated to be presented in a work like the present. The relations between seamen and their employers and masters, which alone belong to this branch of law, are regulated by Part III. of "The Merchant Shipping Act, 1854" (17 and 18 Vict. c. 104, secs. 109 to 290).

744. In all ships, except those of small tonnage engaged in the coasting trade, the master is bound to enter into a written agreement with every seaman whom he carries to sea. The seaman undertakes to serve on board the ship during the voyage, the duration and character of which must be specified in the agreement (see 36 and 37 Vict. c. 85, sec. 7), for certain

specified wages and provisions, to conduct himself in an orderly, faithful, and honest manner, to be diligent and obedient to the master, or to any person who shall succeed him in command, and to the officers of the ship. "The breach of these duties, and of this engagement," says Mr. Abbot (*Law of Merchant Ships and Seamen*, p. 135), "consists in desertion, quarrelsomeness, turbulence, mutiny, disobedience, neglect of duty, drunkenness,—offences which, according to the frequency of their occurrence, the length of their continuance, and their circumstances in each particular case, besides the penalties and forfeitures enacted by the statutes, may at common law justify the personal restraint and correction of the mariner, or subject him to dismissal and forfeiture of wages."

745. However manfully and efficiently the mariner may have performed his duty, and however great may have been the perils or actual sufferings to which he has been exposed, he is not entitled to any remuneration beyond his covenanted wages. For these the ship is pledged to him. "He has a right to cling to the last plank in satisfaction of his wages." The old maxim, that "Freight is the mother of wages," has been abrogated by the Merchant Shipping Act (17 and 18 Vict. c. 104), and wages may now be recovered, either by seamen or apprentices, even though no freight has been earned by the vessel. But in cases of shipwreck the mariner's claim for wages will be barred by proof that he did not exert himself to the utmost to save the ship, cargo, or stores : sec. 183.

746. The following are the regulations of the statute as to the *time of payment* :—

747. "In the case of a home-trade ship, the wages shall be paid within two days after the termination of the agreement, or at the time when the seaman shall be discharged, whichever shall first happen" (sec. 187); and in the case of foreign-going ships "the owner or master of the ship shall pay to each seaman on account, at the time when he lawfully leaves the

ship at the end of his engagement, two pounds, or one-fourth of the balance due to him, whichever is least, and shall pay him the remainder of his wages within two clear days (exclusive of any Sunday, Fast Day in Scotland, or Bank Holiday) after he so leaves the ship ;” and if not so paid, unless the delay was due to the act or default of the seaman, the wages “ shall continue to run and be payable until the time of the final settlement thereof ” (43 and 44 Vict. c. 16, sec. 4).

748. When a seaman is left on shore at any place abroad, in consequence of being unable to proceed on the voyage, the master is to deliver to certain functionaries, named in the Act, a just and true account of the wages due, and to pay the same to the seaman, either in money or by a bill drawn upon the owner of the ship. (Sec. 209.)

749. In order to prevent desertion, and to preserve the wages of seamen for the benefit of their families, the Legislature has restricted the sum which may be paid to them, in parts beyond the seas, to one-half.

750. By deserting the ship, the seaman forfeits not only his wages, but also all clothes and effects he may have left on board ; and if the master has been forced to pay higher wages in order to procure a suitable substitute, the difference will form a ground of claim against the seaman. (Sec. 243 (1).) If the seaman, having left the ship with leave from the master, refuses to return, his wages are forfeited. (Sec. 243 (2).) A seaman arrested for desertion may, on a ship being found, on a subsequent survey, not to be in a fit condition to proceed to sea, or that her accommodation is insufficient, obtain damages against the master or owner. (36 and 37 Vict. c. 85, sec. 9.)

751. Arrival of the ship in port does not terminate the agreement ; and by departure without leave from the master, or other just cause, before she is placed in security, the mariner subjects himself to forfeiture of a month's wages. (Sec. 243 (3).)

752. The seaman is entitled to his food, and want of provi-

sions will justify him in leaving the ship. (1 Hagg. 59 and 182 ; Shee's Abbot, 136.)

753. Cruelty on the part of the master, or an entire change in the destination of the vessel, will also justify departure. (Limland v. Stephens, 3 Esp. 269 ; Edward v. Trevellick, W. R. vol. ii. 586 ; Shee's Abbot, *ut sup.*)

754. It is not desertion if a seaman leave his ship for the purpose of forthwith entering the royal navy ; and stipulations for the purpose of defeating the proviso of the Act to this effect are not only void, but they subject the master or owner who has caused them to be inserted in the agreement to a penalty of twenty pounds. (Sec. 214.)

755. It has been decided by the Court of Admiralty, that if a woman does the work, she is entitled to claim the wages of a mariner. (Jane and Matilda Chandler, 1 Hagg. Ad. Rep. 187.)

756. As the chief aim of the Merchant Shipping Act of 1876 (39 and 40 Vict. c. 80) is the protection of the lives of seamen, its main provisions may be indicated here. Sending or taking a ship to sea in an unseaworthy condition, unless where proved to have been in the circumstances reasonable and justifiable, is a misdemeanour ; and it is an implied condition, notwithstanding any agreement to the contrary, in every seaman's engagement, that the owner, master, and all others concerned, shall use all reasonable means to have the ship in seaworthy condition, but exempting them from liability where the reverse was reasonable and justifiable. (Secs. 4, 5.) The Board of Trade may detain ships deemed unseaworthy for survey ; for which purpose it provides for the appointment of Courts, and prescribes procedure. This may be done on the complaint of any one, who may, however, be required to give caution, unless where the complainers are one-fourth, being not less than three, of the crew. Grain cargo may not be carried in bulk ; deck cargoes are subject to dues as if added to the registered tonnage ; and heavy penalties are

imposed on masters and owners for carrying deck-loads of timber at certain seasons. The Act further provides for the marking of ships with deck and load lines, which must be done and reported to the collector of customs, and entered in the articles of agreement and in the log, before any engagement can be made with a crew. The name and address of the managing owner, or other party entrusted with the management of the ship, must be registered under penalty every time the ship leaves the kingdom. This Act repeals certain parts of previous statutes and the whole of that of 1875. (38 and 39 Vict. c. 88.)

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## CHAPTER V.

## MASTER AND APPRENTICE.

757. The term apprentice is derived from the French word *apprendre*, to learn ; and the contract of apprenticeship, accordingly, is one whereby one person becomes bound to teach, and another to learn, a certain trade or profession.

758. The obligation, on either side, may be either gratuitous or for a pecuniary consideration.

## I. ORIGIN AND NATURE OF THE CONTRACT.

759. Apprenticeship originated in those guilds and corporations into which craftsmen entered, during the Middle Ages, for purposes partly of monopoly, and partly of mutual protection against feudal oppression. In all stages of society, more particularly in its earlier and simpler stages, trades and professions are frequently hereditary ; and even where such is not actually the case, the relation between master and apprentice bears so close an analogy to that of parent and child, that apprenticeship has always been reckoned amongst the domestic relations. Much interesting and curious information and speculation as to

the origin of the "colleges," guilds, and corporations of modern Europe, and their relation to the previously existing organization of Roman provincial society, will be found in Sir Francis Palgrave's *Rise and Progress of the English Commonwealth*, i. p. 329 *et seq.*; see also his *History of England and Normandy*, i. 33.

760. Till recently, the members of the respective corporations of which the burghs of Scotland were composed, possessed exclusive privileges of trading within their bounds; and these privileges they communicated only to those who became members of their body by means of apprenticeship. These exclusive privileges are now abolished (9 Vict. c. 17); but the incorporations still retain their other corporate privileges; and their regulations for the admission of their members, unless contrary to law, are valid and binding. The same remark applies to such professional incorporations as the Writers to the Signet in Edinburgh, who still deny admission to their body unless an indenture be produced.

761. The rules by which it is intended that the relations of the master and apprentice shall be governed in each particular case must be embodied in a written instrument, regularly signed and tested, which is termed an *indenture*, from the English practice of cutting it in two, or rather dividing the duplicates of which it consists, in a waving line; so that when the one half, which is retained by the master, is applied to the other half retained by the apprentice, the two indented edges shall tally. Notwithstanding the origin of the name of this instrument, it has been decided in England that an indenture of apprenticeship need not be indented. (*R. v. Stratton*, Bur. Set. Ca. 72; see *Arnold's Municipal Corporations*, p. 59.) In Scotland it never is.

762. No technical words are necessary to constitute the relation of master and apprentice; though the decisions both here and in England seemed to be to the effect, that *teaching* on the

one hand, and *learning* on the other, must be expressly set forth as the primary objects of the contract, and will not be presumed, from the respective ages or other circumstances of the parties, or the nature of the employment. It is necessary that there should be some such mode of distinguishing between apprenticeship and service, because, if a person who is an apprentice be punished under the statutes as a servant, or *vice versa*, the whole proceedings will be illegal, and an action of damages will lie against the complainer. "The contract with an apprentice," said Lord Jeffrey, "though it may include a contract to work for hire, is primarily a contract to teach and to learn a certain handicraft." (*Frame v. Campbell*, June 9, 1836.)

763. *Who may enter into an Indenture.*—An apprentice is generally under age. If he be a pupil (*i.e.* under fourteen), the indenture is signed by his father as his administrator-in-law, or his tutor, he being himself incapable of contracting. If he be a minor (*i.e.* from fourteen to twenty-one), his father, or his curators, if he have them, must be parties to the indenture (*Low v. Henry, Hume*, p. 422); but they only consent to the obligations which the apprentice, in this case, takes expressly on himself. If he have neither father nor curators, he may enter into the contract without them, though his deed would be liable to be reduced, on the ground that advantage had been taken of his inexperience. (*Stair*, i. 6. 32; *Ersk.* i. 7. 33.)

764. If the minor deceive the master, by representing either that he has no curators or that a wrong person is a curator, and that person sign the deed along with the minor, it will be binding on the minor. (*Fraser*, 340.)

765. In all these cases, the pupil or minor may be restored against the indenture, if he can prove that he has suffered lesion by it; for example, if it binds him to a trade obviously beneath his station, or imposes obligations of a harsh, griping, or immoral nature. (*Harvie v. McIntyre*, March 7, 1829; *Ersk.* i. 7. 62.)

766. *Contract must be in Writing.*—Actual service or teach-

ing on trial will complete a written contract of apprenticeship although in many respects informal, but it will never supply the absence of writing, though it may, however, found an action to compel execution of the contract or for damages. (Fraser, 342)

767. *Stamp*.—The indenture must be stamped; the amount of duty increasing in proportion to the premium paid or the value of the interests involved. If the apprentice fee is not accurately set forth, the indenture will be void.

768. By the Merchant Shipping Act (17 and 18 Vict. c. 10. sec. 143), all indentures of apprenticeship to the sea service are exempted from stamp duty; and a similar exemption has also long existed in the case of pauper children apprenticed by the parish or by a public charity. In these cases it is unnecessary to state the premium.

769. Where there is no premium the duty is 2s. 6d.

770. Indentures may usually be stamped after the date of their execution, during periods which vary according to circumstances; but the safer course is to write them on stamped paper.

#### II. OBLIGATIONS OF MASTER AND APPRENTICE.

771. Almost all corporations and societies have peculiar arrangements with reference to their apprentices; and to these if they do not interfere with law, the Court will give effect.

772. The apprentice cannot be called upon to perform menial or other duties unconnected with the trade of his master, unless they be stipulated in the indenture. (*Peter v. Torrol*, 2 Muir 28 (1818).)

773. A mason, who kept his apprentice constantly hewing stones, without teaching him to build, was found to have committed a breach of contract. But in large cities, where hewing and building are separate occupations, carried on by different individuals, this rule probably would not apply (*James Carsewell*, July 7, 1794; Fraser, 359.)

774. The master generally cannot fulfil the duty of teaching his apprentice unless he attends to his own business ; but if he have a skilful partner or other superintendent, his personal superintendence will not be required. (*Gardner v. Smith*, M. 593.)

775. The master is not entitled to transfer his apprentice to another, unless it be the custom of the trade to do so ; but in many trades the custom is so well established and so notorious, that both parties would certainly be held to have had it in view at the time of contracting. (*Edinburgh Glass Co. v. Shaw*, M. 597 ; *Fraser*, 361.)

776. *Medical Attendance*.—The position of an apprentice in this respect differs from that of a servant. On the principle that he is a *quasi* member of the master's family, the latter is bound to find him in proper medicine and medical attendance as long as there is any probability of his recovery. (*Fraser*, 363.) [For the penalty imposed on the neglect of this obligation, *vide supra*, 651.]

777. *Enlisting*.—By the common law of Scotland, the apprentice cannot enlist (*M'Gregor v. Mitchell*, May 31, 1825 ; *Fraser*, 348) ; but this is modified by the [Army Discipline and Regulation Act, 1879 (42 and 43 Vict. c. 33, sec. 92 ; continued annually). By that statute an apprentice "who has been attested as a soldier of the regular forces" may be reclaimed by the master while under the age of twenty-one, provided he was bound by a regular indenture for at least four years, and was under sixteen years of age when so bound. To do so he must make an oath before a justice of the peace within a month from the apprentice's absconding, to the effect that he was in his service in that capacity ; that he left it without his consent, and that he was under twenty-one. The master then obtains a certificate from the justice of these facts. A Court of Summary Jurisdiction may then, on being satisfied of the master's claim, order the officer, under whose command the apprentice is, to deliver him

[up to his master. If the apprentice stated on attestation that he was not an apprentice, he may, on the requirement of the commanding officer, be punished by the Court by imprisonment for not more than three months. A master who gives up the indenture of his apprentice a month after his attestation is entitled to so much of the bounty payable to the apprentice on enlistment as has not been paid to the apprentice before notice was given that he was an apprentice.]

778. The master is entitled to all the earnings of the apprentice, whether gained in the service of another or by employment on his own account. (Fraser, 350.)

779. If the apprentice fail to conduct himself with decency, honesty, and sobriety, the master is entitled to dismiss him, and to claim damages from his cautioner. (*Bunell v. Alexander*, June 12, 1793; Fraser, 351.)

780. On the subject of dismissal, the principles already stated under the contract of service are, for the most part, applicable to that of apprenticeship.

### III. DISSOLUTION OF THE CONTRACT.

781. The consent of both parties, if clearly expressed in writing, will be sufficient to dissolve the contract; and at the death of either party it is at an end. (Fraser, 366.)

782. The executors of the master will not be compelled to refund such part of the apprentice fee as may be considered a fair remuneration for the instruction given during his life. (*Cutler v. Libberton*, M. 583; *Burn's Justice*, i. 200.)

783. Should the contract, on the other hand, be dissolved by the death of the apprentice, the whole fee remains with the master. (*Shepherd v. Innes*, M. 589.)

784. The insanity of either party will void the contract, unless it be a merely temporary attack. (Lessels, 3 Sup. 337.)

785. The master's bankruptcy will put an end to it, and

the apprentice to rank on the sequestrated estate for a proportion of the apprentice fee. (*Ogilvie v. Hume*, 34.)

The marriage of a male apprentice does not annul the contract; but on the marriage of a female, her husband will be liable to her person, though he will be liable in damages to the master. (*Fenton v. Findlay*, Elch., *vide* Apprentice, 3; *Fraser*,

The contract will be dissolved by any occurrence which either party incapable of fulfilling its obligations, whether the occurrence be voluntary, as by failing to take out a licence or by failing to pay the fee required by statute, or involuntary, by becoming permanently disabled by bodily disease. (*Fraser*, 1368.)

An indenture to a company will be binding so long as the original partners is in existence; and, in the case of a stock company, it will not be at an end though all the partners retire, provided no attempt be made to transfer the indenture to a different company. (*Ib.*)

*Cautioners of Apprentices.*—The cautioner binds himself that the apprentice shall faithfully discharge his duty, under the penalty of a certain sum to be paid to the master on failure.

Cautioners have the benefit of division; but, even before the passing of the Mercantile Law Amendment Act (19 and 20 Vict., sec. 8), the master was not bound to discuss the indenture before coming on them. (*Balfour v. Hutton*, M. 3565; *v. Dickson*, 4 Sup. 708.)

Every plea which would be valid to the apprentice as a defence against an action of damages for breach of contract will be valid to the cautioner. (*Aikman*, M. 12311; *Robertson v. Hume*, p. 20.) If the penalty in the indenture is greatly in excess of the remuneration for damages, it will be equitably restricted by the Court.

The cautioner has an action of relief against the appren-

tice in all cases in which he is called upon. (Ersk. iii. 3. 65.)

793. *Statutory Provisions.*—For these *vide supra*, secs. 651, 710, 714.

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## CHAPTER VI.

### HERITABLE AND MOVEABLE SUCCESSION.

#### I. OF THE DISTINCTION BETWEEN HERITABLE AND MOVEABLE PROPERTY.

794. It is indispensable, for many legal purposes, that the line by which heritable and moveable property in Scotland are distinguished should be distinctly traced. Some of these purposes have already been pointed out in treating of the relations of husband and wife, and parent and child ; but it is in its influence on the laws by which the succession to property and its transmission are regulated, that the importance of the distinction which we have mentioned becomes most apparent.

795. The character of heritable or moveable, which in some, though by no means in all respects, corresponds to real and personal property in England, may belong to an object, either (1) from its own nature, *i.e.* from its being really immoveable, as lands or houses, or moveable, as money or furniture ; or (2) from its relation to a subject which possesses either of these characteristics ; or (3) from the destination of its owner, he having placed it in the position of an accessory to some other object, or declared that, in respect to succession, it shall be regarded as possessing one or other of these characters.

796. (1.) *Natural Character.*—Land, and all parts of land, such as mines and quarries, and generally things which are naturally immoveable, are in law heritable. Whatever moves, or is capable of being moved from place to place, without injury, or

change of nature, either in itself or in a subject with which it is connected, is moveable. (Stair, i. 2. 2; Ersk. ii. 2. 4, 7; Bell's Prin. 1472.)

797. (2.) *Accessory Character*.—Things which are naturally moveable may become heritable, from the relation in which they stand to immoveable objects; for example:—

798. Anything which has been artificially attached to land, so that it cannot be removed without destruction, or change of nature or of use, is heritable by accession. Though this accessory heritable character may be acquired by objects which are neither built on the soil nor fixed into it, it is generally to buildings and fixtures in mills, houses, and to objects which are so fixed, or of such extent that they cannot be removed entire, that it belongs. (Stair, ii. 1. 40; Ersk. ii. 2. 4–7, note 5 to Ivory's ed. p. 241; Bell's Prin. 1473; [Brand's Trs., 1878, 5 R. 607].) Such objects become heritable when, though not completely fixed to a heritable subject, they are either essential or material to the use of the heritage; or if there is a special adaptation of their construction to the use of the heritage giving them a special value, which they would not have if placed elsewhere; or where there is an express declaration by the owner of an intention that they should be annexed to the real estate. (Dowall, 1874, 1 R. 1180.) [Tile-hearths are heritable by accession. Grates, gas-lustres and brackets, picture-rods, also ornamental stone lions and fire-clay vases attached to stone pedestals by stucco and cement, are moveable. (Nisbet, 1880, 7 R. 575.)]

799. Trees, evergreens, and all plants not requiring seed or cultivation, are likewise heritable (Macleod, June 24, 1761, M. 5436; Anderson, 6 D. 1315); the reverse being the case with the industrial fruits of the soil. These latter go with the property of the seed and labour, and are regarded as manufactures, in which the productive powers of the soil are employed. (Stair, Ersk., and Bell's Prin. *ut sup.*) [But in the case of

[Nisbet (which was one between the buyer and seller of an estate) vegetables in the kitchen garden were held to be included in the sale, and therefore heritable.] Things, on the other hand, which are heritable in their nature, may become moveable by possessing the character of accessories to moveable objects of greater importance. A share of heritable subjects, forming part of the stock-in-trade of a mercantile company, is a trust estate in the partners, and moveable. (Bell's Prin. 1474.)

800. (3.) *Destination*.—Where there has manifestly been a purpose with reference to any object which, if effected, would have changed its character from moveable to heritable, or the reverse, it will be changed accordingly. Thus, materials prepared for completing the windows of a house, though not yet applied to that purpose, have been held to be heritable. (Johnson, Feb. 25, 1783, M. 5443.) The same will be the effect of a positive destination in point of succession either to the heir or the executor. Books and furniture may thus be made heritable by destination as regards succession. (Veitch, May 25, 1808, M. Sewand, Conf. App. 4.) But the character thus artificially imposed on subjects by destination will not be permitted to change their character as regards the diligence of creditors. (Forbes, 1772 ; Bell's Prin. 1475.) Spinning-machines having no special adaptation to the building, and only attached to it for their more convenient use, have been held to be moveable in a question between heir and executor. (Dowall, *ut sup.*)

801. *Incorporeal Subjects*.—These follow the analogy and share the character of the corporeal subjects to which they refer. Thus, rights to land, whether of property or liferent, are heritable. Bonds and dispositions in security are no longer heritable, except in regard to the fisk ; but they are not to belong to the husband *jure mariti*, nor to the wife *jure relictæ*, and are to be held heritable in computing legitim. If executors are expressly excluded, such bonds will still be heritable to all intents and

purposes. (Titles to Land Act, 1868, sec. 117.) [Mortgages over land in England, being personal property by the law of that country, are moveable in Scotland, and are not affected as to the rights of husband and wife or legitim by the Titles to Land Act. (Monteith, 1882, 10 R. 982.)]

802. Simple personal debts, even though payable at a future time, with interest from that time, are in general moveable (Ersk. ii. 2. 7; Tuffie, Jan. 14, 1808; Hay, May 15, 1807; Bell's Prin. 1479); as are also shares of companies, whether public or private, and Government stock. (Bell's Prin. *ut sup.*)

803. Arrears of the annual returns of debts and funds, themselves heritable, are moveable. To this class belong arrears of rents and feu-duties, arrears and savings of interest on heritable bonds, reversions of the price of land sold judicially. Even though secured on land, these are regarded simply as cash in the hands of the person in right of them. (Ersk. ii. 9. 64; Bell's Prin. *ut sup.*)

804. Where lands are sold by the owner, the price is moveable; but the reverse is the rule where the sale is by an apparent heir, the price in that case coming in place of the lands. (Emalie, Feb. 25, 1817; Hume, 197, 1856; Heron, May 30, 1856, 18 D. 917.)

805. Rights having a tract of future time, such as liferents and annuities, are heritable. (Stair, ii. 1. 4; Ersk. ii. 2. 6.) Leases are heritable. Patent rights and copyrights, though having a tract of future time, are moveable. (See *infra*, "Patent" and "Copyright.")

806. *Accession*.—On the principle of accession, feu-duties and casualties of superiority, rents of land, interests of heritable bonds and annuities are heritable, though the arrears, as has been mentioned, are moveable. (Bell's Prin. 1483, 4.) Rights connected with or affecting lands, though not feudalized, are heritable: such as servitudes, teinds, patronages, reversions, faculties and rights to challenge heritable deeds. (Ersk. ii. 2. 5.)

807. *Destination* operates in changing the natural character of incorporeal rights precisely as in the case of corporeal. Thus the exclusion of executors in a personal bond will not make it heritable. Sums directed to be laid out by trustees on heritable securities are heritable. (Dick, July 4, 1828; Bell 1492.) Rents of lands and houses vest and become heritable at the legal terms of Whitsunday and Martinmas. (C. 1 July 24, 1668.) Interest, where no conventional tenancy is stipulated, is in the same position as rent.

808. An adjudication before the legal term will carry the radical right to the subject, and with it the rent which is due at the term; arrestment after the term will carry the interest due at the term; and an adjudger following after an arrestment may be postponed on the rent due at the term previous. (C. 14, and 11, 12; Bell's Prin. 1504.)

## II. OF SUCCESSION IN GENERAL.

809. A proprietor is allowed by the law of Scotland to dispose both of heritage and moveables by gratuitous conveyance under certain restrictions arising out of the rights of creditors and children, which have been already explained.

810. But it is where the proprietor has neglected to exercise this privilege that the law of succession, properly so called, comes into operation. In this case the law supplies the omission by disposing of the estate and effects of the deceased in the way in which it may reasonably be supposed that he would himself have disposed of them. As every man is presumed to be acquainted with the laws of his country, the estate of a man dying intestate is regarded as equivalent to a man dying testate, in so far as the law is concerned, and it is presumed that he was satisfied with the law, and wished them to take effect.

811. The leading distinction between the law of heritable and moveable succession are, that a preference is given to the creditors of the deceased in the case of heritable succession, and that the law of succession is more strictly regulated in the case of moveable succession.

males; and the privileges of primogeniture are recognised in the former, not in the latter. (Stair, iii. 4. 26; Ersk. iii. 8. 3.)

812. The person to whom heritage descends is called the heir, whilst he who inherits the moveables is called the executor. Both characters may be united in the same individual, as in the case of a sole surviving child.

813. The whole estate of the deceased, heritable and moveable, is called his *hæreditas*; until taken up by the heir, it is known as *hæreditas jacens*. (Bell's Prin. 1638.)

814. The person who takes the benefit of the *hæreditas* is called the representative of the deceased; is burdened with his debts; and, indeed, is legally regarded as the same person (*eodem persona cum defuncto*). (Ib.)

815. *Opening of the Succession*.—The succession opens by natural, not by civil death. In the latter case there is no succession, the criminal's estate being forfeited to the Crown. (Hume, Crim. Law, 546.)

816. But the succession may open before death under the provisions of a strict entail, declaring certain acts to infer forfeiture of the estate, and its devolution on the next heir in succession. (See Entail.)

817. *Vesting*.—In order that a succession may vest in any particular person, he must possess the following requirements: 1. He must have been conceived at the opening of the succession, and be born alive; 2. must be legitimate; 3. a subject of the Queen, either by birth or naturalization; and 4. of uncorrupted blood, i.e. not lying under a sentence of treason. (Bell's Prin. 1641.)

818. [*Presumption of Life Limitation*.—A recent statute—the Presumption of Life Limitation Act (44 and 45 Vict. c. 47)—has provided for the succession to the estates of persons who have disappeared for long periods of years, but of whose death there is no evidence. Sec. 1 provides that where a person has been absent from Scotland, or has disappeared, or has not been

[heard of for seven years, and who, at the time of his leaving or disappearance, was possessed of, or entitled to, or has since become entitled to, heritable or moveable property in Scotland, any person entitled to succeed to such absent person may obtain from the Court authority to enjoy the income of such property, as if he were dead; or he may obtain sequestration of the estate, and the appointment of a factor to pay over the income to him. After another seven years from the Court's deliverance giving him the income he may apply for and obtain from the Court the fee of the *moveable* estate (2); and, after the lapse of thirteen years from the deliverance awarding him the income, he may, in like manner, obtain the fee of the heritage.

819. [Secs. 4 and 5 provide for the applicant's obtaining (where he has made no application for the income at the end of seven years from the disappearance) the fee of the moveables within fourteen years, and of the heritage within twenty years, from the disappearance.

820. [Sec. 8 provides for the purposes of this Act, in all cases where a person has left Scotland, or has disappeared, and where no presumption arises from the facts that he died at any definite date, he shall be presumed to have died on the day which will complete a period of seven years from the time of his last being heard of, at or after such leaving or disappearance.

821. [It is apparent that this last provision is incompatible with the full operation of secs. 2, 3, and 4, for it would cut away their application to the case of a person, who had become entitled to the estate, the right to uplift which was under application seven years after his disappearance. This has been recognised by the Court, who refused a petition, presented on that footing under the fourth section, on the ground that there being no "presumption arising from facts" that the absent person died at a certain date, he must be held, under sec. 8, to have died seven years after he was last heard of. (Craig, 1882, 9. R. 434.)

822 [The Act does not apply to persons disappearing who have never been in Scotland, though the application concerns heritable estate situated in Scotland. (Rainham, 1881, 7 R. 207.) Nor is it meant to benefit a fiar who desires to be relieved of the burden of a liferent on his estate, when the liferenter has disappeared. (Peterhead School Board, 1883, 10 R. 763.)]

### III. DESCENT AND CONSANGUINITY AS APPLICABLE BOTH TO HERITABLE AND MOVEABLE SUCCESSION.

823. *Consanguinity*.—There are three lines of consanguinity—descending, collateral, and ascending. The descending and ascending are called lineal, in distinction to the collateral.

824. *Lineal descent* includes all issue, immediate and remote ; and each generation forms a *degree*.

825. *Lineal ascent* comprehends parents and ancestry in the direct line, as high as evidence can reach.

826. *Collateral kindred*—i.e. brothers and sisters, uncles and nephews, aunts and nieces, and cousins—also descend from a common ancestor with the deceased, but do not follow each other in lineal succession.

827. Under the head of collaterals it is necessary to distinguish between full and half blood, and under the half blood between consanguinean and uterine.

828. *Full blood*.—Persons stand in this relation to each other who are born or descended of the same father and mother ; such persons are said to be *german*.

829. *Half blood relations, consanguinean*, are persons born or descended of the same father, but not of the same mother.

830. *Half blood relations, uterine*, are persons born or descended of the same mother, but not of the same father. (Bell's Prin. 1647 to 1654.)

831. The law of heritable succession recognises no relationship between these two classes, and there is no succession in

heritage of the one to the other *ab intestato* (Bell's Prin. sec. 2); but a different rule has recently been introduced in moveable succession. By 18 Vict. c. 23, sec. 5, it is provided that "where an intestate dying without leaving issue, and his father and mother have both predeceased him, shall not any brother or sister german or consanguinean, nor any descendant of a brother or sister german or consanguinean, but leave brothers and sisters uterine, or a brother or sister uterine or any descendant of a brother or sister uterine, such brothers and sisters uterine and such descendants, in place of their deceased parent, shall have right to one half of his moveable estate."

832. Relationship, whether by the full or the half blood, is reckoned in Scotland to extend as far as propinquity is established by evidence. (Ersk. iii. 10. 2.)

#### IV. OF HERITABLE SUCCESSION.

##### 1. *Of Intestate Heritable Succession.*

833. *Primogeniture and Preference of Males.*—The heritable estate descends to the lawful issue of the person dying intestate, and who was last "vest and seised" in the land, is, feudally recognised as its owner in possession—the issue of such issue; first, males succeeding in the land, and next, females succeeding as heirs portioners. The issue of the eldest son exclude the second son and his issue, both male and female; next, the second son and his issue, male and female, the sons in their issue or daughters as heirs portioners; and so on through the issue and their issue. (Bell's Prin. 1658 and 1660; See Ersk. iii. 8. 5.)

834. *Heirs Portioners.*—Failing male issue and issue of males, the female issue inherit equally—the issue of males have died taking their mother's rights. The issue of females

partners is *pro indiviso*—that is to say, each succeeds to an equal right in the undivided estate; a legal form being provided, by which any one of them can enforce a division should they be unable to settle the matter extrajudicially, by arbitration or otherwise. (Jurid. Stylea, vii. 329; Shand's Prac. 605; Bell's Prin. 1695 and 1081; see also Bell's Dict. *voce* Brieve of Division, and works referred to.)

835. There is no difference between daughters of a first and any subsequent marriage of the father. (Stair, iii. 5. 11; Ersk. iii. 8. 13; Wallace, 1758, M. 5371; Smith, 1792, M. 5381.)

836. The children of a daughter succeed to her in accordance with the ordinary laws of heritable succession; the sons and their issue taking first in their order, and failing them, the daughters as *heirs portioners*.

837. The eldest heir portioner has an exclusive right to the mansion-house of an estate in the country without compensation to her sisters, and she is entitled to claim the portion of land which lies nearest it (Stair, iii. 8. 11; Ersk. iii. 8. 13); but she has no such right to a house in town, or to a country villa. (Wallace, Jan. 20, 1756, M. 5371.) She is also entitled to peerages, dignities, and titles of honour, which are not otherwise destined in the patents by which they are conferred. (Bell's Prin. 1659.) These privileges are called her *præcipuum*.

838. She has also a preferable right to subjects which in their nature are indivisible, *e.g.* a house in town, a villa, or a superiority; but in these cases she must give compensation. When there are more superiorities or rights to feu-duties than one, they are divided like other subjects. (Peadie, Feb. 2, 1743, M. 5367; Rae, Nov. 30, 1809.)

839. The eldest heir portioner has likewise the custody of the title-deeds. (Rae, *ut sup.*)

840. *Representation*, or the right of the children of a descendant who has died before the opening of the succession to come

## FAMILY RELATIONS.

into his place, which has recently been introduced into succession in moveables, has always been the rule in heritable succession. (See Text-writers, *ut sup.*)

841. *Collateral Succession*.—When the line of descent is exhausted, the succession, instead of ascending to the grandfather, deviates to the collateral line. Even amongst collaterals, except in the case of conquest, which will be afterwards considered, the rule is in favour of descent. Thus, on the death of a middle brother, his younger brothers in their order, and their issue, succeed in preference to an elder brother or his issue. Elder brothers succeeding to younger are preferred in the inverse order—viz. from younger to elder upwards, each transmitting to his issue according to the ordinary rules. (Bell's Prin. 1662.)

842. The brothers of a female succeed in preference to sisters, the order just mentioned being observed. When sisters succeed to each other, they do so as heirs portioners. German or full blood, male and female, to the last trace of connection, excludes the half blood. (Bell's Prin. *ut sup.*)

843. The half blood consanguinean follows the full brothers first in the above order. If the brothers called succession are the issue of a former marriage, the younger brother succeeds first, and gradually upwards; but if the issue of a subsequent marriage, the eldest succeeds gradually downwards. (Ib.; and Lady Clarkington, 1664, M. 14867.)

844. Sisters consanguinean succeed to brothers consanguinean as heirs portioners. The half blood uterine is excluded. (Prin. 1665.)

845. *The Ascending Line*.—Failing collaterals, the father succeeds; he and his relatives excluding the mother (Stair, iii. 4. 35; Ersk. iii. 8. 9.)

846. Heritage never ascends to the mother or even the mother's own estate, if it has

son or daughter, never passes to the maternal line again. 668.)

*Ultimus Hæres*.—The Crown, as last heir, takes the place on the failure of the three lines of succession stated. The Crown also succeeds where a bastard dies intestate, and without heirs of his body, because a bastard having no father in law, except as liable for aliment as above stated (p. 76), can have no heirs but his own children. The Crown of a bastard is entitled to terce; and the Sovereign, on succeeding to a bastard or to a person lawfully born, pays the debts of the deceased, as far as the value of the estate goes, but no further; and his creditors may attach the property by proper diligence, calling as parties the officers of State representing the Crown. (Stair, iii. 3. 47; Ersk. iii. 10. 1; Prin. 1669, 1957.)

The Crown possesses corresponding rights to moveable property. (Bell's Prin. 1937.)

An *heir apparent* is one who cannot be disappointed by the death of a nearer heir, e.g. an eldest son. (Ersk. iii. 8. 54; Prin. 1677.)

An *heir presumptive* (a term scarcely known to the law of Scotland) is one who may be so cut off; e.g. a brother, where no son yet born. An heir presumptive becomes an heir apparent when the succession has opened, and he is entitled to take the estate at law, but before he has completed his titles. An heir apparent is also an heir presumptive before the opening of the succession. (Bell's Prin. 1677.)

An apparent heir may enter into possession of lands and receive the rents, but he cannot remove tenants who derive their rights from the deceased proprietor. (Bell's Prin. 1682.)

His right to the rents runs from the period when the succession opened, so that, on his own death, his executors take the unlevied rents, or the interest of the price of the land. (Ib.)

853. He may bring the estate to judicial sale for debt, even although it be not bankrupt. (Bell's Prin. 1684.)

854. *Annus Deliberandi*.—In accordance with the civil law (Dig. lib. xxvii. 8), a year is allowed to the heir, computed either from the ancestor's death, or from his own birth, if posthumous, for deliberating whether he shall take up the succession, or decline to incur the responsibility for debt which it implies. (Stair, ii. 12. 28, and iii. 5. 1; Ersk. iii. 8. 54.) This privilege is limited by 21 and 22 Vict. c. 76, sec. 27, which provides that "actions of constitution and adjudication against an apparent heir on account of his ancestor's debt or obligation, for the purpose of attaching the ancestor's heritable estate, and actions of adjudication against such heir on account of his own debt or obligation, for the purpose of attaching such estate, may be insisted in at any time after the lapse of six months from the date of his becoming apparent heir."

## 2. Of Heritable Succession by Deed.

855. Until 1868 our law did not recognise any conveyances of property not made by *disposition*, a deed which ostensibly sets forth a completed transaction between living persons. Hence, however clearly the intentions of a deceased person had been expressed in a will or testamentary writing, even if quite valid as a conveyance of heritage according to the law of the country in which it was executed, it could not receive any effect in regard to heritable property in Scotland. Now full effect is given to such writings; and a disposition is no longer necessary. The present law is, "where such (testamentary) deed or writing shall contain, with reference to any lands, any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor of the granter, or upon the grantee or legatee, of such moveables, a right to claim and receive the same, such deed or writing, if duly executed in the manner required or permitted in the case

of any testamentary writing by the law of Scotland, shall be deemed and taken to be equivalent to a general disposition of such lands." (Titles to Land Consolidation Act, 1868, sec. 20.) In other words, the strict rule which required the word "dis-  
pone," [or other words of *de presenti* conveyance,] to be used is abolished. But it must not be supposed that the mere making of a testament will necessarily deprive the heir of the heritage; it must be clear that the deceased intended by his testament to settle the succession to his heritage. It has been decided that a testament is a valid conveyance of Scotch heritage although it is not executed according to our statutory solemnities, provided it be in conformity with the law of the country in which it was made, and that it *purport* to convey it. (Connell's Trustees, 1872, 10 M. 627; [Studd, 1880, 8 R. 249; aff. 10 R. H. L. 53; McLeod, 1883, 10 R. 1056].) It has also been decided that where the intention of the testator is clear to convey his heritable property, as by his appointing trustees to realize it, words of direct conveyance or gift are not necessary. (Macleod's Tra., 1875, 2 R. 481.) It is to be noted that the word "dis-  
pone" is, [by a later Act, expressly declared to be] unnecessary to the validity of any deed conveying heritage, whether to take effect during the grantor's life or after his death, provided it contain words importing conveyance or present intention to convey. (37 and 38 Vict. c. 94, sec. 27.) The statement of the old law on this subject is allowed to remain in this as in the last two editions, because, since the new law is permissive merely and recent, questions may still arise for the solution of which reference must be made to it.

856. But this [*i.e.* the former necessity for a disposition] does not prevent a man from effectually settling his heritage in a deed possessing the other characteristics of a testament, provided he uses, in the clause in which the heritage is conveyed, the words *give, grant, and dispo*ne, in place of *legate* or *bequeath*. (Mitchell, M. 8092; Robertson, M. 15947; Bell's Prin. sec. 1692.)

857. The fiction on which a deed of this nature proceeds is, that the grantee becomes the proprietor; and the actual possessor accordingly reserves to himself, in a separate clause, his own liferent, and a power to revoke the conveyance.

858. A conveyance will be effectual though it be in general terms, as "of all lands and heritages belonging to me;" but such a clause will not carry the right to a succession which has not opened to the disponent during his life. Such a right must be specially conveyed. (*Leitch*, Feb. 17, 1829, H. of L. 3 W. S. 366.) [Property which is already regulated by a prior special destination to a particular class of heirs will be carried by a subsequent general conveyance, in the absence of evidence showing a contrary intention on the part of the granter. The burden of proof is on the party alleging the intention to exclude. (*Thoms*, 1878, 6 M. 704; *Campbell*, 1878, 6 R. 310; 1880, 7 R. H. L. 100. See also *Glendonwyn*, 1873, 11 M. H. L. 33; *Gray*, 1878, 5 R. 820.)]

859. [Where the form of a conveyance between living persons is not resorted to, the testamentary terms used must be such as clearly to express the testator's intention to pass his heritage by will. "They must be words importing that heritable property is meant to be conveyed as well as moveable, or that the whole estate is to be conveyed without distinguishing between the two kinds." (*Ld. Pres. in Urquhart*, 1879, 6 R. 1026; also *Aim*, 1880, 8 R. 294; *M'Leod's Tr.*, 1883, 10 R. 1056.)]

860. A general bequest of "effects" (*Pitcairn*, 1870, 8 M. 604); another of "whole of property, either in money, bonds, debts, business, and other effects whatsoever" (*Edmond*, 1873, 11 M. 348); [and a third of "all sundry goods and gear, debts, effects, sums of money, heritable and moveable" (*Farquharson*, 1883, 10 R. 1253), have been held not to carry heritage.]

861. [Similarly, a nomination of a nephew as executor, coupled with a bequest of "the residue of my estate" equally

[among certain persons, of whom the executor was one, was held not to express an intention to affect the succession to the testator's heritage. (Urquhart, *ut sup.*)]

862. *Substitutions*.—It is not unusual for a disponent to nominate several persons who shall be entitled to the estate, in an order which he also specifies. The first donee in this case is called the *institute*, the others *substitutes* or *heirs by destination*. (Bell's Prin. 1693.)

863. *Technical Words*.—Where technical words are used, either in describing the several classes of heirs or otherwise, the rule in construing the deed is to adhere to the received meaning of such words, whatever may appear to have been the meaning attached to them by the disponent. Where technical words are not used, the deed will be construed according to the apparent *voluntas testatoris*, which will be collected from its whole strain and purport. Such words thus come to be important, whether our object be to use them correctly, or to avoid their use. (Glen, 1872, 11 M. 160; aff. 1 R. H. L. 49.)

864. *Heir* includes all those who are heirs by law, viz. heirs of line, heirs of conquest,<sup>1</sup> and heirs of investiture.

865. *Heir-male* is a male connected by males, and excludes not only females, but males connected by females.

866. *Heir of line* is synonymous with *heir at law*, *heir general*, *heir whatsoever*, and may sometimes mean *heir of conquest*. (Bell's Prin. 1696.) *Heir* may sometimes mean *of line*, and is also used as distinguished from heir of conquest, though *both* are heirs-at-law.

867. *Heir male of line* means the *heir-male* excluding the *heir of conquest*.

868. *Heir-female* is the *heir-at-law*, male or female, failing *heir-male*.

869. *Heir-male of the body*, in contradistinction to the heir-male, is not necessarily a son of the disponent, but must be in the direct line of descent.

<sup>1</sup> Conquest is now abolished (37 and 38 Vict. c. 94, sec. 37).

870. *Heir whatsoever, or heir whomsoever*, is in general equivalent to *heir-at-law*. (Bell's Prin. 1701.)

871. Ambiguity may arise in point of time. The rule in construction is, that the reference is not to the time of making the deed, but to the opening of the succession. (The Roxburghe Case, June 23, 1807, M. App. 30; *vide* Tailzie; Shepherd, Dec. 1, 1836, aff. 3 S. and M. 255.)

872. *Simple destination*.—The heirs of the dispositive are in general included; but the immediate substitution of one person for another excludes the heirs of the institute, except in deeds by parents to children. (Bell's Prin. 1704 and 1776.)

873. *A clause of return* is a provision that the subject shall return to the grantor and his heirs. Such a clause will in no case be effectual against onerous deeds or the diligence of creditors. (Ersk. iii. 8. 45; Bell's Prin. 1705.)

874. *A power to name* heirs may be given; and, if duly exercised, the nomination is effectual. (Stewart, May 15, 1821, H. of L. 2 W. and S. 369, and 5 W. S. 515.)

875. *Limited Destination* includes (1) destinations in fee and liferent; (2) substitutions, with simple prohibitions; (3) entails; (4) conditional settlements.

876. *Fee and Liferent*.—The unlimited right of possessing and disposing of property is called the fee; the limited right of usufruct during life is called the liferent. These rights may subsist at the same time, either in the same or in different persons; and either of them may be held by one, or by two or more persons. (Bell's Prin. 1710, 1037.)

877. *Conjunct Fee and Liferent*.—Conjunct rights in the persons of husbands and wives, or parents and children, are usually created by marriage contracts (*ante*, see Marriage Contract), and are governed by their provisions.

878. Where the conjunct fee and liferent is in favour of strangers and their heirs, the two are equal fiars during their joint lives; but after the death of the first, the survivor has his

own fee of one-half, and the liferent of the other. After his death, the fee is divided equally between the heirs of both. (Ersk. iii. 8. 35; Bell's Prin. 1709.)

879. If no mention is made of liferent, and the right be to two jointly and their heirs, the conjunct fiars enjoy the subject equally while both are alive; but on the death of the first, both the fee and liferent of his half descends at once to his heir. In a right to two jointly, and the longest liver and their heirs, the words *their heirs* denote the heirs of the longest liver.

880. If the right be to two and the heirs of *one* of them, he alone is fiar; the right of the other resolving into a naked liferent. (Bell's Prin. 1709; Stair, ii. 3. 42; Ersk. iii. 8. 35.)

881. *Substitutions with Prohibition to Alter.* — Such deeds are not entails unless the other conditions of the Entail Acts are complied with, and third parties consequently are not affected by them. They are personal contracts simply, with a condition annexed to the conveyance, the effects of which are limited to the heirs, even heirs being bound by them only according to a rigid construction of their terms. (Bell's Prin. 1716 *et seq.*)

### 3. Of Entails.

882. An entail, or, as it is frequently called in Scotland, a *tailzie*, from *tailler*, to cut, properly signifies any destination by which the legal course of succession is cut off, one or more of the heirs-at-law being excluded or postponed. In its usual acceptation, an entail is a destination of landed property, by which a line of succession, differing from that of the common law, is fixed in perpetuity.

883. Entails were formerly legalized in Scotland by the statute 1685, c. 22. Previous to this period, deeds containing clauses whereby the debts and deeds of the heir in possession were rendered null, and his own right declared to be extinguished if he contravened the provisions of the settlement, had begun to be framed by conveyancers. These clauses are

said to have been devised by Sir Thomas Hope, Advocate to King Charles I., and they were supported by a single decision of the judges; but Mr. Erskine is warranted by Lord Stair, and others of our earlier writers, when he tells us that they were generally accounted "not only contrary to good conscience, as they cut off the right of the lineal heir, but inconsistent with the genius of our law, as they sunk the property of land estates and created a perpetuity of liferents." (Ersk. iii. 8. 25.) In following the course of legislation, we shall see to how great an extent the current of public opinion on this subject has returned to the channel from which the influence of the aristocracy for a time diverted it.

884. The original Entail Act, 1685, c. 22, provides that it shall be lawful to tailzie lands and estates; to substitute heirs with such provisions and conditions as the entailer shall think fit; and to insert irritant and resolute clauses, whereby it shall not be lawful to the heirs of tailzie to sell or otherwise dispose of the said lands, or any part thereof, or contract debt, or do any deed whereby the estate may be apprized, adjudged, or evicted, or the succession frustrated or interrupted.\*

885. All such deeds are declared null, and the heir next in succession empowered, immediately on contravention of the provisions of the entail, to pursue a declarator, and serve himself heir to the last heir who died infeft and did not contravene.

886. A register of entails is also instituted *ad perpetuam rei memoriam*; and provision is made that the same clauses contained in the first shall be repeated in every subsequent conveyance of the tailzied estate. It is declared that omission to repeat these clauses shall be a contravention of the entail against the person and his heirs omitting to insert them, whereby the estate shall *ipso facto* devolve to the next heir; but such omission shall not militate against creditors and other singular successors contracting *bond fide* with the person infeft in the estate, but without the said clauses in the body of his right.

887. It was not till after the lapse of a century that the inconveniences arising from the stringent character of this enactment led to further legislation.

888. [The result of a century of legislation on entails, from the Act of 20 Geo. II. c. 50, which made the earliest relaxation, to the Entail Act of 1882, has been to strip them almost entirely of their original character of a fettered succession, bound to last (if the deed were a sound one) as long as there was an heir called in the destination in existence to take it up, and to reduce a modern entail to the condition—as was recently observed from the bench—of no more than “a reasonable family settlement,” in which no fetters can be laid on unborn heirs. A deed of strict entail is, however, still necessary to secure the object, namely, a restricted proprietorship as distinguished from an unlimited fee on the one hand, and a mere liferent on the other, which was the aim of the statute of 1685. An entailed estate, even as between the heirs themselves, cannot be created at common law. (D. of Hamilton, 1868, 7 M. 139; aff. H. L. 8 M. 48.)

889. [The cumbrous form which required the insertion of long and elaborate fettering clauses is now no longer in use, for sec. 14 of the Titles to Land Act of 1868 dispensed with the insertion of these clauses in future entails, provided the deed contains a clause authorizing registration in the Register of Tailzies. Their insertion in writs by process had been dispensed with in 1847. But though not expressed, they were to be understood in every future entail, though their import is now diminished, since of the three cardinal prohibitions, the latest Act really leaves effect to only the last—that against altering the order of succession.

890. [The Rutherford Act (11 and 12 Vict. c. 36) divided entails into two classes, now called “old” and “new” entails, the former comprising all entails dated before its passing (1st August 1848), and the latter all dated thereafter. Its 43rd

[section put into the hands of heirs of entail an instrument by which the fetters imposed by their ancestors have been struck off by the great proportion of entailed proprietors in Scotland, when it enacted that an entail, defective in any one of the three cardinal prohibitions, should be regarded as defective in all.

891. [One main effect of the Act of 1882 is (with insignificant exceptions) to abolish the distinction between old and new entails, and place them on the same footing. Old entails are now regarded, for legal purposes, as dated on 1st August 1848, and the latter of the dates they bear.

892. [As regards the power of selling the entailed estate, an heir of entail is now in the same position as an ordinary fee-simple proprietor, except only that he must obtain authority from the Court of Session, on satisfying it that such a step would be for the benefit of all concerned. (Ballantine, 1883, 10 R. 1061.) The right to apply to the Court for power to sell extends not only to the heir in possession, but to any creditor of his who, in respect of any debt incurred after the passing of the Act, has obtained decree for payment and has charged upon it, if the debt be not paid within six months of the expiration of the charge (sec. 18). It also extends to the person who would have been heir in possession in the case of land held in trust to be entailed, and to the tutors, curators, or administrators of such heir or person (sec. 19). The sale of the estate, however, does not put an end to the entail. The price of the land remains entailed estate, subject to the destination and conditions in the deed of entail of the land for which it is a surrogate, till the series of heirs is exhausted or the estate disentailed. The Act makes elaborate and minute provisions for the disposal of the money. The price must be consigned as there directed, and invested for behoof of the seller and the other heirs of entail (sec. 23).

893. [The power to put an end to the entail by disentail, is

[nearly as unlimited as the power to convert the entailed estate from land into money. The Rutherford Act gave power to disentail with the consent of the three next heirs ; the Act of 1875 limited the required consent to that of the heir apparent, the interests of the other two heirs being valued by the Court. The Act of 1882 has empowered the Court to supply the consent of the heir apparent, and value his interest also ; and has put it in the power of the heir in possession, who is of full age and under no legal incapacity, to disentail when he pleases, on application to, and authority from, the Court.

894. [This power is restricted only in two events. These are where the heir, or the heir apparent, has already by marriage contract secured the descent of the entailed estate on the issue of his marriage. In that case neither the heir in possession nor the heir apparent can, respectively, apply for, or consent to, a disentail, until a child of the marriage, capable of taking the estate in terms of the contract, be born, who can, himself or by his guardian, consent thereto ; or the marriage be dissolved without a child ; unless the trustees in the marriage contract concur in the application. Old entails, in this respect, are governed by sec. 8 of the Rutherford Act ; new, by sec. 17 of the Act of 1883.

895. [It thus appears that an entail of the present day differs from a settlement of land with a simple destination in respect only that it cannot be evacuated merely by the granting of another deed habile for that purpose at common law, but only in a particular way, namely, by a formal deed of disentail, after application to, and under authority from, the Court of Session ; and that a similar sanction is attached to the conversion of entailed land into " entailed money " (see sec. 23 (4) of the Act ; Rankine on Land Ownership, 2nd ed. p. 970 and 977, notes to sec. 3 and 17 of the Act of 1883.)

896. [Various other powers—power to excamb, to feu, to grant leases, to charge for improvements or for provisions to

[widows, husbands, or younger children—have been given to heirs in possession by the series of entail statutes from the Montgomerie Act of 1770 to the Act of 1882. In view of the ampler powers of sale and disentail now conferred, those minor faculties are of less importance; and as to discuss them at all would involve their discussion in detail, the attempt to do so would be beyond the limits of this work. Reference is made to the second edition of Mr. Rankine's work, both to the text, p. 569 *et seq.*, and to the appendix, where the whole entail statutes are printed *ad longum*, with annotations.]

#### 4. Of Conditional Settlements.

897. Settlements to land may be dependent on other conditions than the limitations of an entail; and these conditions may be either implied or express.

898. 1st, *Implied Conditions*.—The only condition that is generally implied is, that the conveyance shall be effectual only *si testator sine liberis decesserit*, i.e. if the maker of the settlement shall die without lawful issue. Even this presumption, however, may be defeated by evidence, or by opposite presumptions. (Bell's Prin. 1776–1780. See L. J.-C. in Blair's Exs. 1876, 3 Rettie, 364.) [It does not apply to bequests of plate, furniture, linen, books, etc. (M'Alpine, 1883, 10 R. 837; Wauchope, 1882, 10 R. 441.) It applies not only to children, but to descendants in the direct line, however remote. (Grant, 1882, 10 R. 92.)]

899. 2nd, *Express Conditions*.—The rule as regards express conditions is, that if they be intelligible they shall be effectual, unless they are—1. Beyond the power of the maker of the deed; 2. Impracticable; 3. Inconsistent with law; or, 4. Contrary to morals—*contra bonos mores*. In these cases they are held *pro non scriptis*, and the destination is the same as if no condition had been annexed to it. (Bell's Prin. 1781–1785.)

### 5. *Of the Entry of the Heir.*

900. It was formerly mentioned (see Heritable Succession by Deed) that, in the transmission of heritable property from an ancestor to an heir, the form [where that form is used] is that of a conveyance from one living person to another. It follows, as a natural consequence of this rule, that when his right to the succession has been judicially recognised, the heir makes up his titles to the estate in the same manner as if it had been conveyed to him by sale or gift during the lifetime of the ancestor.

901. The constitution and transmission of rights in land will fall more properly to be treated under the head of Sale; and the only branch of the subject which here requires notice, is that which has reference to the proceedings by which the fact of heirship is judicially ascertained.

902. *Entry by Service.*—A service was formerly the verdict of a jury on the rights of a claimant to the heritage of the deceased. If the claim was to lands in which the deceased was feudally vested, the service was called *special*; if to those to which he held personal rights, it was a *general* service, though, in violation of etymology, the special often embraced the general, not the general the special service.

903. The trial took place in obedience to a brieve or precept from the Sovereign, which was issued from Chancery at the request of the claimant, and directed either to the Sheriff of the county in which the lands lay, or, where the lands lay in several counties, to the Sheriff of Edinburgh, if the service was a special one; or to any sheriff or burgh-magistrate if it was a general one.

904. The proceeding is now regulated by the Titles to Land Consolidation Act, secs. 27 to 58 inclusive; but the Act 10 and 11 Vict. c. 47, which does not materially differ from the provisions of the more recent statute on this subject, is unrepealed. These statutes have made very important changes on the former practice.

905. The brieve from Chancery is abolished, and services are directed to proceed by petition to the Sheriff of the county within whose jurisdiction the lands lay, or to the Sheriff of Chancery at the option of the petitioner ; and this whether the service be general or special. If the deceased had no domicile in Scotland, or if the claim be for special service to lands in different counties, the petition is competent to the Sheriff of Chancery only.

906. The conditions of entail, and all other burdens, conditions, and limitations, may be referred to in the petition, instead of being inserted at length.

907. When the petition has been duly intimated and published in accordance with the provisions of the Act, and the prescribed periods have elapsed, the Sheriff shall, by himself, or by the provost or any of the bailies of any royal burgh, who are thereby authorized to act as commissioner of such Sheriff without special appointment, or by any commissioner whom such Sheriff may appoint, receive all such evidence, documentary and parole, as might competently have been laid before the jury summoned under the brieve of inquest, and any parole evidence shall be taken down in writing, and a full and complete inventory of the documents produced shall be made and certified by the Sheriff or his commissioner ; and on considering the said evidence, the Sheriff shall, without the aid of a jury, pronounce judgment, serving the petitioner in terms of the petition, in whole or in part, or refusing to serve him and dismissing the petition, in whole or in part ; and this judgment shall be equivalent to and have the full legal effect of the verdict of the jury under the brieve of inquest, according to the practice theretofore existing.

908. In the event of a competing petition, it shall be lawful for the Sheriff to dispose of the petitions, either together or separately, after the same manner.

9. The petition, with the judgment of the Sheriff annexed,

is directed to be transmitted to the Director of Chancery or his depute, by whom it shall be recorded, and an authenticated extract prepared and delivered to the party; and this extract shall be equivalent to an extract of the retour under the former brief of service.

910. These proceedings may be advocated to the Court of Session for jury trial; and where the Sheriff has refused to serve the petitioner, or dismissed his petition, or repelled the objection of an opposing party, his judgment may be brought under review by appeal.

911. A decree of special service, thus obtained, besides operating as a retour, shall have the effect of a disposition by the deceased to the heir, who shall be entitled to make up his titles to the estate in the usual form. Under the provisions of the Act 10 and 11 Vict. c. 46, if the heir served in *special* had died without taking infestment, his service lapsed. A *general* service did not, however, do so; by the recent Act, sec. 47, the special service shall, upon being recorded in Chancery and extracted, vest in the heir served a personal right to the lands contained in it, and render the same liable to his debts and deeds, and to the diligence of his creditors, as well after his death as during his life. The succeeding heir will therefore make up his title by serving to him, unless the titles of the lands contain a prohibition.

912. It is provided, that in future no decree of special service shall operate or be held equivalent to a general service to the deceased, except as to the particular lands thereby embraced, and that it shall infer only a limited passive representation of the deceased; and the person thereby served shall be liable for the deceased's debts only to the extent or value of the lands embraced in the service, and no further.

913. The heir of line, or heir-male, may petition for a general service in the same petition in which he asks for special service, and without further notice or publication.

914. A general service may be applied for, and obtained to a limited effect, by annexing a specification to the petition ; and such service shall infer only a limited passive representation to the extent of the relative specification. This provision comes in place of the former service, *cum beneficio inventarii*.

915. Entry by service is still a legal, and in many cases a convenient, way of making up a title ; but it is now enacted that a personal right to the lands vests in the heir by mere survivance without service, and the heir or disponee of any proprietor vested only with such personal right may make up a valid title as provided by the Act. (37 and 38 Vict. c. 94, secs. 9, 10.)

916. *Entry by Writ of Clare Constat*.—This is a form of voluntary recognition on the part of the superior, by means of which the heir may frequently be spared the expense and trouble of a service. (Ersk. iii. 8. 71.)

917. What was called a *precept of clare*, was an injunction from the superior to his bailiff to infeft the person in whose favour it was granted, *quia mihi clare constat*, etc.,—that the defunct died last vest in the lands, and that the claimant is his heir. On this precept an instrument of sasine was expedite and recorded. (Ib.)

918. The "Titles to Land" Act (21 and 22 Vict. c. 76, re-enacted by sec. 101 of the Consolidation Act, 1868) having rendered the use of the instrument of sasine optional, provides (sec. 11), that in place of the superior directing that the person applying to him shall be infeft, he shall merely declare that he is the heir of the last vassal ; that it shall be competent to record this *writ* of clare constat—as, in accordance with the change in its substance, it is instructed to be called—in the Register of Sasines ; and that, when thus recorded, the writ shall have the same force and effect as if a precept of clare constat had been granted, and an instrument of sasine duly expedite and recorded according to the former form.

919. When lands are held of the Crown or Prince, a precept

from Chancery was issued, containing, like the precept of clare constat, both a recognition of the heir's character and a command to infeft him. For this precept a simple writ of recognition has been substituted, as in the preceding instance.

920. *Entry by Adjudication on a Trust-Bond*, the chief object of which was to enable the heir to challenge deeds adverse to his right, without immediately rendering himself liable as heir—a device of Sir Thomas Hope's—is rendered less valuable than formerly by the Service Amendment Act (sec. 49 of 1868 Act) above referred to, wherein it is provided that general services may hereafter be obtained to a limited effect by annexing a specification. In the entry by adjudication, the heir grants a bond to a confidential person for a sum equal at least to the value of the estate. The holder of the bond charges the heir to enter, and on his refusal adjudges the estate. On the title which he thus acquires he brings a reduction of the adverse deed; and if he is successful in this, he reconveys the bond and the adjudication on it to the heirs. In practice, this form of entry is now unknown.

921. *Charges Abolished*. — Charges were commands in the Sovereign's name, issued at the instance of a creditor, whereby the heir was required to take up the succession, and certifying him that, in case of failure, the creditor should have action against the estate in the same manner as if he had done so. These forms are abolished by 10 and 11 Vict. c. 48, sec. 16, and c. 49, sec. 8 (1868, sec. 60); and it is provided that, in an action for the ancestor's debt against the unentered heir, the citation on and execution of the summons shall be held to imply and be equivalent to a charge, and shall infer the like certification.

922. By 21 and 22 Vict. c. 76, sec. 27, the period allowed to the heir for deliberation, before such actions can be raised against him, formerly a year, is limited to six months. (*Ante*, sec. 820.)

## V. OF SUCCESSION IN MOVEABLES.

1. *Intestate Succession.*

923. Moveable follows the same course as heritable succession, except in three points: It admits, 1<sup>st</sup>, no preference of males; 2<sup>nd</sup>, no privilege of primogeniture; and 3<sup>rd</sup>, no distinction between heritage and conquest. (Stair, iii. 4. 24; Ersk. iii. 9. 1 *et seq.*; Bell's Prin. 1860, 1861.)

924. Till recently, there was no representation by the issue of a predeceasing next of kin (*ib.*); but this, and several other serious defects in the Scottish law of intestate moveable succession, have been removed by 18 Vict. c. 23 (1855).

925. But the rule which places the issue of a predeceasing next of kin in the parent's place still suffers a limitation. No representation is admitted among collaterals after the descendants of brothers and sisters. (Sec. 1.)

926. The former rule, that after descendants, collaterals should in every case succeed before ascendants, has been modified in favour of the father and mother of an intestate, thus:—

927. § 3. "Where any person dying intestate shall predecease his father without leaving issue, his father shall have right to one-half of his moveable estate, in preference to any brothers or sisters, or their descendants, who may have survived such intestate."

928. § 4. "Where an intestate, dying without leaving issue, whose father has predeceased him, shall be survived by his mother, she shall have right to one-third of his moveable estate, in preference to his brothers and sisters or their descendants, or other next of kin of such intestate."

929. The full blood still takes precedence of the half blood; but as regards brothers and sisters uterine, who were wholly excluded by the former law, the following is now the rule:—

930. § 5. "Where an intestate, dying without leaving issue,

whose father and mother have both predeceased him, shall not leave any brother or sister german or consanguinean, nor any descendant of a brother or sister german or consanguinean, but shall leave brothers and sisters uterine, or a brother or sister uterine, or any descendant of a brother or sister uterine, such brothers and sisters uterine, and such descendants, in place of their predeceasing parent, shall have right to one-half of his moveable estate."

931. The following sections, as was formerly observed (see *Marriage Contracts*), have removed what in many cases were the sole reasons for substituting the provisions of a marriage contract for those of the common law :—

932. § 6. "Where a wife shall predecease her husband, the next of kin, executors, or other representatives of such wife, whether testate or intestate, shall have no right to any share of the goods in communion; nor shall any legacy, or bequest, or testamentary disposition thereof, by such wife, affect or attach to the said goods or any portion thereof."

933. § 7. "Where a marriage shall be dissolved before the lapse of a year and day from its date, by the death of one of the spouses, the whole rights of the survivor and of the representatives of the predeceaser shall be the same as if the marriage had subsisted for the period aforesaid." It must not be forgotten that this provision relates to moveable property only, the old rule being still in force as to heritage. (See *Dissolution of Marriage by Death*.)

934. This rule of course does not apply to property made separate in the wife's person by *deed*, the succession to which will be regulated by the clauses of the deed under which it is held as separate.

## 2. Of Testate Succession in Moveables.

935. A testament or will (in the law of Scotland the words are synonymous) may be made at any period of life beyond the

age of fourteen in males, and twelve in females. The near approach of death, or the severest bodily or even mental suffering, will not affect its validity, provided the testator was of sound mind and acquainted with its contents when he signed it. (Toword, June 5, 1812, H. of L. May 16, 1817, 5 Dow, 231; White, Jan. 21, 1814, H. of L. June 20, 1823, 1 Shaw, 472; Gillespie, Feb. 11, 1817, F. C.; Watson, Nov. 18, 1825; M'Diarmid, May 17, 1826.)

936. It must be the *last* will of the deceased. The scriptural maxim, that a testament "is of no strength at all while the testator liveth" (Heb. ix. 17), is the rule with us; and a will may consequently be revoked at pleasure. (Ersk. iii. 9. 5.)

937. Where several testaments are left, of different dates, the earlier ones are presumed to be revoked by the last, which alone is effectual. (Dougal, Feb. 25, 1789, M. 15949.)

938. All persons being capable of testing who are capable of consent, minors require no consent from their curators (Ersk. i. 7. 33; Fraser, P. and C. 381), wives from their husbands (Ersk. i. 6. 28; Fraser, H. and W. 564; Menzies' Lectures, p. 460), nor interdicted persons from their interdictors. (Mansfield v. Stuart, June 26, 1841; Fraser, P. and C. 562; Menzies, p. 44.) Although a minor may make a testament, he cannot change the succession to moveables held under a destination. (Fraser, P. and C. 341.)

939. But it is only a person who leaves neither wife nor child who can dispose of the whole of his moveable estate by will; and a testament in favour of strangers becomes ineffectual by the birth of children after it is made (Menzies, 461), the *jus relictæ* of the widow and the legitim of the children being protected by law from its provisions. (See *Jus Relictæ* and *Legitim*.)

940. Even previous to death, the moment he is seized with his last sickness, or, as it has been expressed, "begins to die" (Dirleton, *voce* Legitima Liberorum; Ersk. iii. 9. 16; Menzies, 460) (which one would suppose was the moment he was born),

the husband or father is precluded from alienating the goods in communion to the prejudice of his wife or children.

941. The share of the goods in communion which falls to the wife as *jus relictæ* becomes her absolute property. No legitim to children is due on it, and she can therefore dispose of the whole of it by will. The subject of *jus relictæ* has already been treated under the head of Husband and Wife. (*Ante*, sec. 200 *et seq.*)

942. *Legitim*.—In the event of there being a widow, one-third—and if there be no widow, one-half—of the whole moveable estate is set apart as *legitim*, or bairns' part; and over this the deceased has no power of testing. (Ersk. iii. 9. 17 and 19.) Considering the peculiar legal character of *legitim* as a fund on which the father cannot test, and the definitions of "intestate" and "moveable estate," given by the interpretation clause of the statute (18 Vict. c. 23), it seems clear that the right of representation, thereby introduced into moveable succession, does not apply to legitim. No person can die intestate as regards either legitim or *jus relictæ*; and the Act is expressly limited to the whole free moveable estate, on which the deceased might have tested, undisposed of by will.

943. The claims to *legitim* may be excluded in two ways: 1st, By provisions, expressly stated to be in lieu of it, being settled on children to be procreated, by an antenuptial contract of marriage. A clause excluding children from their legitim, without making any other provision for them, would be inoperative. Even where the provision is reasonable, the children may reject it, and claim their legal rights; but in that case they could not of course take any other benefit under the contract. But it is not necessary, in order to exclude legitim in an antenuptial contract, to give in lieu of it a *substantial* provision. (Maitland, 1843, 3 D. 244.) 2d, By express renunciation by the child, which is generally, though not necessarily, in consideration of a separate provision. Such renunciations, however, even where a sufficient

provision has been made, will be construed in the strictest manner; for the law will not allow a right founded in nature to be barred by implications or presumptions. (Ersk. iii. 9. 23.)

944. If a child renounce his legitim during his father's life the effect is to increase the legitim of the remaining children but if the renunciation be after the father's death, the other children take no benefit, but the share renounced goes to the general donee, because it is deemed that he has purchased it by paying the sum provided by the settlement as a condition of the renunciation. (Fisher v. Dixon, 1840, 2 D. 1121.)

945. [Where a father has, in a testamentary settlement of his whole estate, made provisions for his children, and expressly declared these to be in full of legitim, any child taking the appointed provision thereby renounces entirely his right to legitim, and cannot claim it in whole or in part without complete surrender of the testamentary provision. If, however, the father's will have not stated the provisions to be in full of legitim, and have not made any declaration or condition of its forfeiture, the child may claim and receive legitim without thereby losing all right to the testamentary provision, but only to so much of it as will amount to an equitable compensation to the other children who may be thereby prejudiced. (Macfarlane Trs., 1882, 9 R. 1138, whole Court.)]

946. Advances made to a child during the father's life for the purpose of setting him up in business, or for a marriage portion will, as a rule, be imputed to legitim. (Bell's Prin. 1588; Douglas, 1876, 4 R. 105.)

947. Legitim is due to all the legitimate children—though by subsequent marriage—of the deceased, including posthumous children, but not to the eldest son if he refuse to collate the heritage, unless he be the only child—in which case he is both heir and executor—or the shares of the others be discharged or satisfied. (Bell's Prin. 1583; L. Panmure, 1856, 1 D. 703.)

948. [*Legitim now due out of Mother's Estate.* — By the Married Women's Property Act of 1881 (44 and 45 Vict. cap. 21), it is now enacted that "the children of any woman who may die domiciled in Scotland shall have the same right of legitim in regard to her moveable estate which they have according to the law and practice of Scotland in regard to the moveable estate of their deceased father, subject always to the same rules of law in relation to the character and extent of the said right, and to the exclusion, discharge, or satisfaction thereof, as the case may be." This section is to be held as applicable where the parents were married before the passing of the Act, as well as to the case of marriages contracted thereafter. (Poë, 1882, 10 R. 356; aff. H. L. ib. 73.) The above rules, therefore, which have been fixed by decision in regard to father's legitim, will apply equally to that from the mother's estate.]

949. *Dead's Part.*—The remaining portion of the moveable estate, which alone may be bequeathed by will, is called the dead's part. (Ersk. iii. 9. 18.) It may be increased by express renunciations or discharges of their legal rights by the wife or children, so as to include the whole estate; or it may be either increased or diminished by the conventional provisions of a marriage contract.<sup>1</sup> (*Ante*, p. 62.)

950. Whatever can be positively ascertained to have been the wishes of the deceased with reference to this portion of his property, will be carried into effect, provided that they are neither inconsistent with public law, immoral, insane, nor impossible. (Stair, iii. 8. 35; Ersk. iii. 9. 5; Bell's Prin. 1862 *et seq.*) The will of a fool being thus valid, and that of a madman invalid, many of the difficulties which arise in judging

<sup>1</sup> A distribution of the moveable estate, similar to that which still prevails in Scotland, was followed by the ancient customs of the city of London, and of the province of York, and was probably common to the whole island. These customs were abolished by 19 and 20 Vict. c. 94, sec. 1. (See Stephen's Com. vol. ii. p. 222.)

of the validity of wills are occasioned by the uncertainty of the line which divides folly from madness.

951. By the Act 39 Geo. III. c. 98, called the Thellusson Act, it is made illegal to direct the accumulation of property beyond certain periods—viz. beyond twenty-one years after the testator's death, or the minority or minorities of persons living at the testator's death. It was provided that the Act should not extend to any disposition respecting heritable property in Scotland, but this limitation was repealed, and the Act so extended, by 11 and 12 Vict. c. 36, sec. 41. The same Act was extended to accumulations of the proceeds of heritable estate by 11 and 12 Vict. c. 36.

952. *Rules for making a Will.*—The two leading objects to be kept in view in constructing a will, are—1<sup>st</sup>, That it shall be clearly expressed; and, 2<sup>d</sup>, that it shall be obviously the production of the testator, or at least that it was understood and assented to by him. (*Watson v. Noble's Trustees*, Nov. 18, 1825; *Menzies*, 460.) For the attainment of these objects the following rules have been fixed:—

953. *Verbal and Written.*—A verbal expression of intention proved by witnesses, will convey legacies to the extent of £8, 6s. 8d. (£100 Scots) each. (*Bell's Prin.* 1874.) If a larger sum be mentioned by the testator, it will be restricted to this sum; it being requisite, in order that a larger sum be bequeathed, an executor appointed, or any former will or legacy recalled, that the expression of intention be in writing. (*Bell's Prin.* sec. 1847.) But a legacy is to be distinguished from a *donatio mortis causa*; the latter, being *de præsenti*, is effectual without writing, if delivered, to any amount, and may be proved by parole evidence sufficiently unambiguous and conclusive to overcome the legal presumption against donation. (*Morris*, 1867, 5 Macph. 1036; *Ross*, 1871, 10 Macph. 197; *Gibson*, 1872, *ib.* 923; [*Thomson*, 1884, 11 R. 453; *Milne*, June 5, 1884]).

4. *Holograph*.—Wills written with the grantor's own hand, more difficult of forgery than others, are valid in law without witnesses. (Pennicuick, 1709, M. 16970; Bell's Prin.) But it is not enough to produce a document all in one writing and bearing to be signed by the testator, or even making a statement to the effect that it was written and signed by him. The document must be proved to be holograph of a deceased, by showing either that the body of the deed or signature is his. (Lord Chancellor (Chelmsford), in *Ander-Gill*, April 13, 1858.) If the will bears to be holograph, a party challenging must disprove this; but if not, the party upholding the will has the burden of proof laid on him. To make a deed holograph it is not necessary that every word of it should be in the handwriting of the grantor, provided the substantial parts are; [and a holograph signature to an appended deed "adopting" the non-holograph parts as holograph has been sustained as making a holograph deed between living persons. (*Gavine's Trs.*, 1883, 10 R. 448.)]

5. [A holograph will should be signed at the end by the testator; like any other deed; it is not enough that the testator's name be written by his own hand, as, "I, A. B., etc.," occurs in the course of the writing. Such a writing, in the absence of evidence to the contrary, is presumed to have been left incomplete by the testator; and if found in his repositories after his death will not have effect as his will. (*Stair*, iv. 42. 6; *Dunlop*, 1839, 1 D. 38; *Skinner*, 1883, 11 R. 88.) But a holograph deed between two persons unsubscribed, but containing the grantor's name and delivered and acted upon, has, however, been sustained. (*Weir*, 1872, 10 Macph. 438.)]

6. [And in the case of wills, also, the presumption of incompetency may be overcome by sufficient evidence of intention on the part of the writer that the document should have effect as his will. The strongest instance of such evidence would be a separate deed, in a separate regular deed, to the document in question

[as the person's will ; but evidence written, or parole, from circumstances more or less short of that, may be sufficient (Russell's Tra., 1883, 11 R. 283.)]

957. Prior to 1st October 1874, holograph deeds, not subscribed in presence of witnesses, did not prove their own validity unless supported by other evidence, but it is now enacted "every holograph writing of a *testamentary character* in the absence of evidence to the contrary, be deemed to have been executed or made of the date it bears." (37 and 38 Vict. c. 94, sec. 40.)

958. [A will may be written in pencil. (Simson, 1883 R. 1247.)]

959. *Testing*.—If not written by the grantor's hand, the deed must be signed by him, if he is able to write, before witnesses, who may be either males or females above four years of age. (1584, c. 133 ; Bell's Prin. 1868 ; Menzies, 431 and 32 Vict. c. 101, sec. 139 ; Hannay, 1873, 1 R. 2.) It is to be recommended that a wife should not act as a witness to her husband's deed.

960. Blind persons, who cannot see the party write, and in such persons, cannot be instrumentary witnesses ; [but it is no disqualification to a witness to a will that he has a beneficial interest in the deed. (Simson, 1883, 10 R. 1247 ;] Menzies, 109 *et*

961. If the testator acknowledge his signature to the witnesses, the effect will be the same as if they had seen him write. [The acknowledgment may be made in any way, either by word or act, provided it be clearly taken by the witnesses to be an acknowledgment. (Cumming, 1879, 6 R. 963.)]

962. The names and designations of the witnesses and of the writer were formerly required to be mentioned in the body of the deed ; but neither is now any longer necessary ; and the designations of the witnesses may be appended to their signatures which may be done any time before the deed is put on record or produced in a court of law, and need not be done by

witnesses' own hands. (37 and 38 Vict. c. 94, sec. 38.) The witnesses' signatures may be adhibited and the testing clause added to a deed after an interval,—in one case four months,—as long as there is no suggestion of fraudulent motive in the delay. (Stewart, 1877, 4 R. 427.) [The benefit of the Act, however, does not extend to a deed where the signatures of the witnesses were adhibited before the subscription of the granter, and where they neither saw him sign nor heard him acknowledge his subscription. (Smyth, 1876, 3 R. 573.)]

963. [Even though a deed be improbable according to the above rules, it is not necessarily invalid, for sec. 39 of the same Act provides that no deed, bearing to be subscribed by the granter, and to be attested by two witnesses subscribing, shall be invalid on account of any informality of execution, but the burden of proving that it was properly subscribed and attested lies upon the party "using or upholding the same." (Tener, 1879, 6 R. 1111.) This provision does not apply to deeds executed before the passing of the Act. (Gardner, 1878, 5 R. 638; aff. ib. H. L. 105.) To give a deed the benefit of this section, it is enough that, though consisting of several sheets, it be subscribed by the granter and witnesses on the last page only. (M'Laren, 1876, 3 R. 1151; Brown, 1884, 11 R. 400.)]

964. It will be no objection to a will that the testator was blind when he signed it. (Menzies, 105.)

965. If the testator's hand has been led, or letters traced on the paper for him to follow, the signature will not be held to be his, and the deed will be reduced. (Ib. p. 102.) It has, however, been held lawful to *steady* a testator's hand, provided it be not led in the formation of the letters. (Noble, 1875, 3 R. 74.)

966. Every page must be signed [(Gardner, *ut sup.*)]; and marginal notes must be signed by writing the Christian name or names above the note or before it, and the surname after or under it. But if the deed be written on a *single sheet*, though

folded into more than one page, one signature at the end is sufficient. (Mont. Bell. p. 35 ; Smith, July 4, 1816, F. C.)

967. Subscription by initials, though not invalid, requires to be proved to be the ordinary practice of the writer, and has better be avoided. Subscription by a mark is invalid. (Ib. 103, 104.)

968. The deed must either be read by the grantor or read over to him in such a way as to acquaint him with its contents before signing. The fact of its not having been read or understood, however, will fall to be proved by the party who alleges it. (Ib. 105 and 460.)

969. When the testator cannot write, a testament will be valid, let the subject be ever so valuable, if it be signed either by a notary or by the Established clergyman of the parish (Menzies p. 137), and two witnesses. In the execution of all other deeds two notaries and four witnesses were formerly required ; but now, by 37 and 38 Vict. c. 94, sec. 41, "any deed, instrument or writing, whether relating to land or not, may be validly executed by one notary, or justice of the peace, and two witnesses. It is only in wills that a clergyman can act as notary.

970. *An Executor*, or person to execute the will of the deceased, and to administer the moveable estate for the benefit of all concerned, is a usual provision, though not an indispensable requisite in a will. From him the moveable estate is frequently called the *executry* of the deceased.

971. The executor is commonly instructed to pay the donations or legacies to the parties for whom they are destined though it is quite competent to convey them directly, and without his intervention. (Menzies, p. 464.) The executor, as such has now no interest in the succession ; the Intestate Moveable Succession Act (18 Vict. c. 23, sec. 8) having repealed so much of the Act 1617, c. 14, "as allows executors nominate to retain to their own use a third of the dead's part in account for the moveable estate of the deceased," and enacted the

"Executors nominate, as such, have no right to any part of said estate."

972. A legacy is valid though there should be an error in the name of the legatee, provided there be no doubt as to the person (*Keiller or Wedderspoon v. Thomson's Trustees*, Dec. 15, 1824; *Menzies*, 471); and, in general, no clerical, orthographical, or other error, vitiates a provision in a will, provided the meaning of the testator be discoverable. (*Grant v. Grant*, March 1, 1851.)

973. If the legatee predeceases the testator, the legacy, never having become due, is not transmitted to the representatives of the former, but continues part of the testator's general executry. (*Rutherfords v. Turnbull*, May 30, 1821.) It is otherwise, of course, if the legacy be devised to the legatee and his *executors*. (*Harvey v. Grant*, Feb. 19, 1824; *Menzies*, 477.)

974. Legacies are universal, general, and special.

975. A *Universal Legacy* is a bequest of the whole moveable estate, or of the residue of it after the other legacies and burdens are liquidated; and the person who receives it is called the universal or residuary legatee, and becomes the representative of the deceased in his moveable estate. (*Menzies*, 472; *Ersk.* iii. 9, 11; *Bell's Prin.* 1872.)

976. A *General Legacy* is a legacy of a thing not otherwise described than by its quantity or value, as £50 of money, without mentioning any particular source from which the £50 is to be derived. The legatee in this case has a claim only for the amount or value; and if the residue, after paying the specific claims, is insufficient, the general legacy will be diminished accordingly. (*Ib.* 473; *Ersk.* *ib.*; *Bell's Prin.* 1873.) General legacies are diminished *pari passu*, and not according to priority of bequest.

977. A *Special Legacy* is where the specific object is mentioned. In this case the legatee considers it at once as his own, and he can claim it from the executor so long as it exists; but

if it perish, he has no claim for its value against the estate (Ersk. *ut supra*; Bell's Prin. 1874.)

978. Special legacies thus rank first after the debts of the deceased, then general legacies, and lastly the residuary universal legacy.

979. *Conditional Legacy*.—A legacy may be burdened with a condition. If the condition be impossible or illegal, it is *pro non scripto*, and the legacy is unconditional. (Ib. Bell's Prin. 1881.)

980. *Substitutions*.—Much difficulty is often occasioned by the substitution of one person for another, and the tendency of the courts is against supporting substitutions in moveable estate. In the case of the first legatee predeceasing the testator, if the bequest was to his heirs, executors, and *assignees*, it goes to the proper representative, and not to him to whom he may have assigned it during the testator's life, because it never came into his possession, and he never had the power of assigning it (Henry, Feb. 19, 1824; Menzies, 480; Bell's Prin. 1878; 1 R. 943.)

981. If a bequest be to one and his assignees, without the substitution of heirs or executors, it does not vest at all, and neither heirs nor assignees have any claim unless he survive the testator (Graham, Feb. 17, 1807.)

982. A legacy to two jointly, or jointly and severally, to the survivor, to the exclusion of the heirs or assignees of the other. (Bell's Prin. sec. 1879.)

983. A legacy to two equally is equally divided,—the heirs or assignees of each taking a half, provided both legatees survived. If one of the legatees predeceases the testator, the other only takes half the legacy. (Paterson, June 4, 1817; Bell's Prin. 1879.)

984. *Form of Will*.—We formerly mentioned that any form of words which conveys the meaning of the testator verbally, is admissible in a will; and it may be added, that

safety of the non-professional conveyancer will generally consist in a studious *avoidance* of technical terms.

The following form is given, simply with the view of suggesting the requisites of a Will, in something approaching to a tabular form. It may be written on common paper [in ink or pencil, and may be filled in on a printed form ;] no stamp duty being now chargeable on any will or other testamentary instrument. (23 Vict. c. 15, sec. 7.)

I, A., do hereby appoint B., whom failing, C., to be my sole executor and universal legatory, bequeathing to the said B., whom failing, to the said C., the whole moveable estate that may pertain or be resting owing to me at the time of my death, under such burdens as may attach to it by law ; and I ordain my said executor to pay and deliver the following legacies to the persons after named and designed (here specify the legacies and design the legatees). In witness whereof I have subscribed this deed, written (if the deed consists of two or more pages, say on this and the preceding page or pages, specifying the number) by (here insert the name and designation of the writer of the will at full length), at (insert the name of the place where the will is signed), the                      day of                      one thousand, etc., before these witnesses, M. and N. (here the full names and designations of the witnesses must [but see *supra*, sec. 962] be inserted either by the writer of the deed or by another who must be named).

(Signed)      A.

M., *Witness.*

N., *Witness.*

Heritable estate as well as moveable may now be bequeathed by will ; see *supra*, sec. 855.

The following is the form of legacy appended to the notices of collections for the Education Scheme, by appointment of the General Assembly of the Church of Scotland :—

"I give and bequeath the sum of                      to the Committee of the General Assembly, for promoting education and religious

instruction throughout Scotland, but particularly in the Highlands and Islands; and the receipt of the Convener or Secretary of the Committee for the time being, shall be a sufficient discharge."

(Forms of Wills, Dispositions, Trust Dispositions and Settlements, Legacies, and the like, will be found in Bell's Law Dictionary *voce* Will.)

985. *Collation*.—Where the estate of the deceased is partly heritable and partly moveable, the heir in heritage has no share in the moveable estate if there be others as near in degree as himself. But as the heir in heritage, where the heritable estate is limited, might be unjustly affected by this arrangement, he is permitted to *collate* the heritage, i.e. to throw it or its value (Fisher v. Fisher, Dec. 5, 1850) into the common stock, and betake himself to his rights as one of the next of kin. (Ersk. iii. 9. 3; Bell's Prin. 1910.)

986. This privilege is extended by the late Act (18 Vict. c. 23, sec. 2) to the child of the heir, being heir in heritage of the intestate, "to the effect of claiming for himself alone, if there be no other issue of the predeceaser, or for himself and the other issue of the predeceaser, if there be such other issue, the share of the moveable estate of the intestate, which might have been claimed by the predeceaser upon collation if he had survived the intestate; and daughters of the predeceaser, being heirs portions of the intestate, shall be entitled to collate to the like effect; and where, in the case aforesaid, the heir shall not collate his brothers and sisters, and their descendants in their place shall have right to a share of the moveable estate equal in amount to the excess in value over the value of the heritage, of such share of the whole estate, heritable and moveable, as the predeceasing parent, had he survived the intestate, would have taken on collation."

987. Even where the heritage is situated in another country the heir must collate if he wishes to share in the moveable su-

cession. (Robertson, Feb. 16, 1816; Robertson, Feb. 18, 1817; Trotter, Dec. 5, 1826.)

988. *Confirmation*.—To entitle the executor—who, in the case of intestacy, by the late Act (18 Vict. c. 23, sec. 1) is the surviving next of kin of the deceased, if he shall claim the office, in preference to the children or other descendants of any predeceasing next of kin—to sue for the debts due to the deceased, and otherwise to take possession of his property for the purpose of administering it for the benefit of those having interest, it is necessary that his character as representative should be recognised by the decree of a magistrate. This decree is pronounced by the Sheriff of the county, in his capacity of Commissary, where the deceased was domiciled, or, if he was domiciled abroad, or his domicile unknown, by the Sheriff of Edinburgh acting as Commissary, and is called *confirmation*. (21 and 22 Vict. c. 56, sec. 3.) The confirmation may include personal estate situated in England or Ireland, or both (ib. sec. 9); and on its being produced in the principal Court of Probate in England or Ireland, or both, and a copy thereof deposited with the Registrar, along with a certified copy of the interlocutor of the Commissary, finding that the deceased died domiciled in Scotland, such confirmation shall be sealed with the seal of said Court, and shall have the like effect in England or Ireland as if a probate or letters of administration had been granted by said Court of Probate. (ib. secs. 12 and 13.) For more expeditious procedure where the estate does not exceed £150, see 39 and 40 Vict. c. 24.

989. If an executor be named in the testament, he is entitled to be confirmed in preference to all other claimants, on production of that document, and of a full inventory of the moveable estate. This is called confirmation of a testament-testamentar. (Bell's Prin. sec. 1893; Graham v. Bannerman, Feb. 28, 1822; Menzies, 467.)

990. If no executor be named, the order of choice observed by the Commissary is the following:—

991. *1st*, The universal legatee, including trustees; *2d*, the next of kin; *3d*, the children or descendants of any predeceasing next of kin (18 Vict. c. 23, sec. 1); *4th*, the widow; *5th*, a creditor, to the extent of any debt which has been constituted either by a writing by the deceased or by the decree of a court; *6th*, a legatee; and *7th* (though the practice be obsolete), the Procurator-Fiscal of the Court; now usually a judicial factor. [Judicial factors may now be appointed by the Sheriff, where the estate does not exceed £100, the value to be ascertained as to heritage from the yearly rent in the Valuation Roll, and as to moveables from the yearly interest at 4 per cent. (43 and 44 Vict. c. 4.)]

992. All executors not nominated in the will must find security to the satisfaction of the Court. (Menzie's, 467.) The inventory is given on oath, and such portions of the estate as are afterwards discovered must be "eiked," or added to it.

993. The executor creditor makes oath to the amount of his debt, which must be constituted (Menzie's, 470), and he must likewise give notice in the *Gazette*. (Menzie's, 469.)

994. Persons succeeding to certain small sums, payable by savings banks and friendly societies, are exempted from the necessity of confirming. (13 and 14 Vict. c. 115, sec. 40, and 7 and 8 Vict. c. 83, sec. 10.)

995. *Order of Payment of Debts*.—There are certain privileged debts, that is to say, debts which the executor is bound to pay before attending to other claims on the estate of the deceased. *1st*, The expenses of a funeral suited to his station and presumed fortune. *2d*, All medical and other expenses connected with his last illness. *3d*, The current rent of the house in which he died. *4th*, His farm and domestic servants' wages for the period current at his death. *5th*, Certain debts which are privileged by statute; *e.g.* the payment by ministers to their widows' fund, and the claims which friendly societies and savings

banks may have against their office-bearers. (Ersk. iii. 9. 43 ; Bell's Prin. 1406.)

996. The period of six months after the death of the deceased must be allowed for ordinary creditors to come forward, and they are then ranked according to the order to be explained below. (*Vide Bankruptcy.*)

997. By the 8th sec. of the Intestacy Act (18 Vict. c. 23), so much of the Act of 1617 as allows executors nominate to retain to their own use a third of the dead's part in accounting for the moveable estate of the deceased, is repealed, and executors have now no right to any part of the succession. The Act of 1617 was never enforced ; and now, unless remunerated by a special legacy, the services of executors are legally, as they have always been practically, gratuitous.

### 3. *Taxes Payable on Succession.*

998. 1<sup>st</sup>, A stamp duty is payable on the inventory of the moveable estate, of about 2 per cent. of the amount of value ; a scale of which will be found in the Stamp Act, 55 Geo. III. c. 184. By 21 and 22 Vict. c. 56, sec. 9, the inventory may include personal estate in England and Ireland. 23 Vict. c. 15, sec. 4, provides that the stamp duties payable by law upon inventories in Scotland, shall be levied in respect of all personal or moveable estate, and effects which any person hereafter dying shall have disposed of by will, under any authority enabling such person to dispose of the same, as he or she shall think fit. If the property has been valued too high, a new inventory may be lodged, when the stamp duty paid on the first will be returned.

999. 2<sup>d</sup>, A duty is payable on the net value of the whole moveable estate as set forth in the inventory, and on all interest and dividends which may have accrued down to the time of paying the duty, after deducting all debts and expenses.

1000. The duty varies from 1 to 10 per cent., according to the degree of relationship of the legatees to the deceased.

Where the legatee is a lineal descendant or ancestor, it is 1 per cent. ; where he is a stranger, it is 10 per cent. The duty is payable on each legacy of £20 and upwards ; where the estate is under £20, there is no duty payable.

1001. No stamp duty is now chargeable on any will, testament, testamentary instrument, or disposition *mortis causa*, in Scotland. (23 Vict. c. 15, sec. 7.)

1002. By the Act, "to amend the law with respect to wills of personal estate made by British subjects (24 and 25 Vict. c. 114), it is provided that wills of personal estate made by British subjects abroad, shall be held good, if made according to the forms of the law of the place where made, or of the law of the domicile, or of the domicile of origin ; that wills made within the United Kingdom shall be good if made according to the law of the place where they are made, and that change of domicile subsequently made shall not invalidate a will. It is declared that the Act shall not invalidate any will that would have been otherwise valid, and that it shall only affect the wills of persons dying after its passing." (6th Aug. 1861. See 821, *supra*.)

1003. When a Scotchman dies abroad, the first point to be ascertained is, whether his foreign residence was temporary or permanent. If the former was the case, his moveable succession descends to his next of kin according to the law of Scotland ; if not, it follows the law of the country in which he had established himself, and the laws of which he is presumed to have adopted. The same rule applies *mutatis mutandis* to a foreigner dying in Scotland. (Ersk. iii. 9. 4.)

1004. As regards heritage, on the other hand, "it is," says Mr. Erskine (iii. 8. 10), "an universal rule in every country, that the succession to land, estates, and all heritable subjects, must be governed by the law of the kingdom or state where they are situated, and not according to the *lex domicilii* of the proprietor, though he should happen to die abroad, and have his settled residence there at his death."

1005. These provisions of the common law are somewhat modified by the statute of 1861 (24 and 25 Vict. c. 121), which provides that where a convention has been entered into with a foreign state, the Queen, by order in Council, may direct that no British subject resident in that state shall be deemed to have acquired a domicile there, unless he shall have been resident there a year before his death, and have deposited in a public office a written declaration of his intention to become domiciled there. The same provision is made, *vice versa*, with reference to foreigners dying in Great Britain, who have not resided there a year, and lodged a corresponding declaration in the Home Office. The Act does not apply to foreigners who have obtained letters of naturalization. Where there is such a convention, the Queen, by order in Council, may direct that, where foreigners die in this country without executors, their consul shall be appointed executor, recover their property, pay their debts, and hold the remainder for behoof of the parties entitled to receive it. All such orders in Council are to be published in the *London Gazette*.

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## CHAPTER VII.

## OF TRUSTS AND TRUSTEES.

1006. *Of Trusts in General.*—The forms of trusts and trusts-deeds are as various as the objects which they have in view, and the provisions which they make for the attainment of these objects. The following features, however, are common to them all:—

1007. (1.) They create a legal estate in the person of the trustee, for the accomplishment of certain objects prescribed by the trustor. (Ersk. iii. 1. 32.)

1008. (2.) The purposes of the trust are limitations of the trustor's right of property, and burdens on the estate preferable

to all claims against it which he may create. (Bell's Prin. 1991; Bell's Com. p. 34.)

1009. (3.) The uses and purposes of the trust may be effectually declared either in the original deed by which it is constituted, or by a supplementary deed,—power so to declare them in future having been reserved in the first deed. (Bell's Prin. 1991; Menzies, p. 674.)

1010. (4.) In so far as not exhausted by the uses and purposes of the trust, the estate remains the property of the truster, as if no trust had been constituted; and the trustee is bound to reconvey it to him or his representatives. (Bell's Prin. 1991.)

1011. *Of the Trustees.*—No specific number of trustees is requisite to constitute a trust; and the number consequently varies according to the object of their appointment. (Bell's Prin. 1993.)

1012. Where the object is to wind up as speedily as possible a bankrupt or insolvent estate, one trustee has generally been found most convenient; and, under the Bankrupt Act, there can be but one trustee in a sequestration. (Bell's Prin. 1993, 1.)

1013. Where the object is to substitute, during a length of time, the management of others for that of the actual possessors of the estate, as in all family settlements, whether by marriage-contracts, or by trust-deeds executed in the prospect of death, several trustees are usually named. (Bell's Prin. 1993, 2.)

1014. If several trustees are named jointly, the presumption is that the truster reposed confidence in them only so long as they acted together; and consequently, if one dies or declines, the nomination falls. (Bell's Prin. 1993; Hepburn, July 13, 1699, M. 7428.)

1015. If a certain number be named as a *quorum*, the trust falls unless that number accept, and their concurrence is requisite

to every act. (Ib., Menzies, 671; Halley v. Gowans, Feb. 20, 1840, 2 D. 623.)

1016. If one is named *sine quo non*, his concurrence is indispensable to every act, and his death puts an end to the trust. (Ib., Menzies, 671; Vere v. Earl of Hyndford, June 1, 1791; Bell's 8vo Cases, 554.)

1017. ["No two trustees can do a trust-act without consultation with their co-trustee" (Ld. Pres., *infra*). Thus, where two trustees, without notice to their third fellow, assumed two new trustees, the assumption was held invalid. (Wyse, 1881, 8 R. 983.)]

1018. To avoid the inconvenience which might arise from these rules, the common practice is to declare that the acceptors or survivors of those who are named shall be the trustees; and in this case the trust subsists so long as any of those who have accepted survive. (Ib., Menzies, 672; Gordon's Trs. v. Eglinton, July 17, 1851, 13 D. 1381; Finellay, June 30, 1855, 17 D. 1014; Seton v. Seton, Nov. 28, 1855, 18 D. 117.) [Even where not expressed, the condition of survivorship is implied. (Oswald, 1879, 6 R. 461.)]

1019. Where, from any unforeseen cause, the nomination is defeated, the Court will not authorize a diminished number to act, but will appoint a factor to carry out the provisions of the trust. (Ib., Menzies, 688.)

1020. By 30 and 31 Vict. c. 97, sec. 12, the Court is empowered in gratuitous trusts, where trustees cannot be assumed under the trust-deed, or where a sole trustee has become incapable of acting, to appoint a trustee or trustees. Upon such appointment the former trustee ceases to be a trustee under the trust-deed. Such trustees have no power to assume new trustees unless it be specially conferred on them.

1021. No one can be compelled to accept, to act, or to incur the responsibilities of a trustee; but after acceptance he cannot decline to act, and will be liable for the consequences of doing so

until he resign or be discharged. Acceptance must be either express or implied by the acts of the trustee himself. But, once accepted, the office could not till recently be thrown up at the will of the trustee; nor will his resignation of it, even now where that may be competent, be presumed without the most express declaration of his intention. (Stair, *More's Notes*, lxxvi.; *Menzies*, p. 688; *Carstairs*, Jan. 20, 1766, 2 *Hailes*, 678; *Logan v. Meiklejohn*, May 26, 1843, 5 D. 1066; *Gordon*, June 2, 1854, 16 D. 884.)

1022. By 37 and 38 Vict. c. 94, secs. 43–45, on the death of a sole or last surviving trustee, dying possessed of an estate in land, his heir-at-law, if not prohibited by the trust-deed or by the Court, if of full age and legally capable, may make up a title to the estate as trustee. But, unless by the consent of the beneficiaries or by the order of the Court, he shall not have power to administer the trust, but shall make it over to the factor appointed by the Court. The Act provides also for completion of title in the person of the administrator appointed by the Court.

1023. If no power of voluntary resignation be contained in the deed, or if it does not fall under the category of deeds to which the provisions of 24 and 25 Vict. c. 84 apply, the Court of Session will exonerate and discharge the trustee, only where it is proved to them that his duties have been fully discharged, that it has become impossible for him in fact, or incompetent for him in law, to discharge them; or where bad health, necessary and permanent absence, or some other very sufficient reason for resignation, is established; but not where the trust has merely become inconvenient or disagreeable. If, from an unforeseen change of circumstances, the trustee shall come to be in a position wholly different from that which he reasonably anticipated when he accepted the office, or in which the truster intended he should be placed, he would be entitled to claim exoneration, on the ground that the trust is no longer that which he undertook. But a very

strong case of this description used to be considered necessary, in order to warrant an application to the Court with any prospect of success. (Gilmour, 14 D. 454 ; Hill v. Mitchell, Dec. 9, 1846, 9 D. 239 ; Pridie, June 9, 1855, 17 D. 835.)

1024. Where the purposes of the trust are completed, and all the parties interested agree to its being wound up and the trustee exonerated, this may be done by a regular written discharge, which the trustee must be careful to have signed by all who are interested in the trust. If a minority of the beneficiaries, however insignificant, should refuse their concurrence, an application to the Court will be necessary. When the purposes of the trust are accomplished, the trustees may be compelled to denude by an action of declarator of trust and adjudication. (Menzies, 689 ; Bell's Prin. 2001 ; Dalziel v. Henderson, March 11, 1756, M. 16204 ; Drummond v. Mackenzie, June 30, 1758, M. 16206.)

1025. If the purposes of the trust are expressed in intelligible language, either in the trust-deed or in a separate deed, the powers of the trustees will be in accordance with these purposes ; and whatever is essential to the accomplishment of the purposes of the trust will be implied as a power in the trustees. Trustees will thus be justified in selling land for the payment of debt, and in building a mansion-house on land which they are directed to purchase and entail. (Bell's Prin. 1997 ; Menzies, p. 680, and cases cited.)

1026. Trustees are generally empowered to name a factor ; and even when no such power is expressed, it will be presumed, at least where the office of the trustee is gratuitous. (Menzies, 682.)

1027. Where trustees have elected a factor, reputed responsible and fit for the office, they will be protected by a clause from liability for his faults or deficiencies, where they have merely been negligent in superintending him. (16 S. 560 ; Dalrymple v. Murray, Aug. 4, 1784, M. 3534 ; Lord Traquair's

*Trustees v. Anstruther's Trustees*, Feb. 6, 1835 ; *Bell's Illus.* ii. 563 ; *Thomson v. Campbell*, Feb. 16, 1838.)

1028. They cannot supersede a factor named by the truster. (*Fulton*, Feb. 15, 1831 ; *Bell*, *ib.* ; *Menzies*, *ib.*)

1029. [*Investments*.—It is provided by the Trusts Act of 1867 (30 and 31 Vict. c. 97), that, where the contrary is not expressly provided in the trust-deed, trustees may invest the trust funds in the purchase of "any of the Government stocks, public funds, or securities of the United Kingdom, or stock of the Bank of England, or may lend the trust funds on the security of any of the aforesaid stocks or funds, or on the security of heritable property in Scotland." Directions as to investments are, however, usually contained in the trust-deed. A direction to lend on "heritable or good personal security," does not cover the purchase of bank stock. (*Grant*, 1869, 8 M. 77.) Power to invest in "bank stock" includes that of any of the Scottish banks in good repute at the time of investment (*Cunningham*, 1879, 6 R. 1333); but if the power be to invest in the stock of "any chartered bank," it will not cover the purchase of stock of an unlimited joint-stock bank registered under the Companies Acts. (*Sanders*, 1879, 7 R. 157.) The retention by trustees, after a reasonable time allowed for realization, of an investment which they have not themselves power to make, is as much a breach of trust as if they had made it themselves, unless the truster had specially given them power to retain it. (*Brownlie*, 1879, 6 R. 1233.))

1030. Where the trustees appoint one of their own number, the Court will not recognise his claim for payment of his business account out of the trust-funds, unless such appointment has been authorized by the trust-deed. (*Menzies*, pp. 61, 62 ; *Montgomerie v. Wauchope*, June 4, 1822, 1 S. 453, and other cases cited by *Menzies* ; *Goodsir*, 20 D. 1141 ; *Gray*, June 21, 1856, 19 D. 1 ; *Clark*, 19 D. 187 ; *Pagan*, 17 D. 1146. The leading case is *Clyne's Trustees v. Clyne*, June 17, 1848.)

1031. *Responsibility of Trustees.*—Trustees may be liable either as trustees or as individuals.

1032. As trustees they are liable to the extent of the trust-funds for the faithful execution of the trust, and for the fulfilment of obligations undertaken by themselves or their factor. As individuals, they are liable when, under cover of their character of trustees, they occasion damage to a third party, resist or culpably neglect the performance of their duty, or exceed their powers. (Bell's Prin. 1999, 2000; Menzies, p. 684.)

1033. Trustees cannot be *auctores in rem suam*; they cannot buy or borrow from the estate, or in short have any commercial dealings with it with a view to their own pecuniary advantage. (Bell's Prin. 1998, 13.)

1034. As trust is not only a gratuitous and troublesome, but too often also a thankless office, trust-deeds generally contain, as an inducement to accept, a clause freeing the trustees from liability for omissions, and limiting their responsibility to their own actual intromissions. But difficulties not unfrequently arise as to the distinction between intromissions and omissions; and it may be stated as a general rule, that where negligence possesses the positively culpable character which the law has attempted to define as *culpa lata*, the exempting clause will not protect the trustee. (Menzies, 684, and cases cited; Bell's Prin. 2000.)

1035. *Power to resign.*—With the same object, it is now usual to insert in family trust-deeds a clause empowering the trustees to resign, and the validity of such a clause has been sustained by the Court. (*Gilmour v. Gilmour's Trustees*, Feb. 7, 1852.)

1036. With reference to trusts constituted and liabilities incurred subsequent to 6th August 1861, the stat. 24 and 25 Vict. c. 84 provides that "all trusts constituted by virtue of any deed or local Act of Parliament, under which gratuitous trustees are

nominated, shall be held to include the following provisions, unless the contrary be expressed,—that is to say, power to any trustee so nominated to resign the office of trustee; power to such trustee, if there be only one, or to the trustees so nominated, or a quorum of them, to assume new trustees, a provision that a majority of the trustees accepting and surviving shall be a quorum, and a provision that each such trustee shall only be liable for his own acts and intromissions, and shall not be liable for the acts and intromissions of co-trustees, and shall not be liable for omissions.” (Sec. 2.) The Act does not extend to trustees appointed under the contracts of trading companies. (Sec. 3.)

1037. The privilege of resigning the office of gratuitous trustee, which is conferred by 24 and 25 Vict. c. 84, sec. 1, and 26 and 27 Vict. c. 115, sec. 1, is farther extended by 30 and 31 Vict. c. 97, sec. 10. It provides—That no trustee to whom any legacy, or bequest, or annuity is expressly given on condition of his accepting the office of trustee, shall be entitled to resign, unless otherwise provided by the terms of the trust-deed: (sec. 1) that when a trustee who resigns, or the representatives of a trustee who has died, cannot obtain a discharge from the remaining trustees, and when the beneficiaries are unable, from absence, incapacity, or otherwise, to grant a discharge, the Court may on petition, after such intimation and inquiry as may be thought necessary, grant such discharge, and if considered reasonable, direct the expenses of the application to be paid out of the trust-estate: (sec. 9) that (1) a trustee entitled to resign may do so by minute entered in the sederunt book signed by himself and the other trustee or trustees acting at the time;—(2) or by signing a minute of resignation in the form of the Schedule A annexed to the Act, or to the like effect, and registering the same in the books of Council and Session,—but he shall in this case be bound to intimate the same to his co-trustee or trustees, and the resignation shall take effect from and after the expiry of one calendar month after the last date of the intimation; but if

the trustee or trustees to whom it is given is not within Scotland, the resignation shall not take effect until after the expiry of three months from its date; and where the residence of any trustee to whom intimation requires to be made is not known, the same shall be given in the usual form, and shall take effect after the expiry of six months;—(3) a trustee who is at the time the sole acting trustee cannot resign until, with consent of the beneficiaries, of full age, and capable of acting at the time, he has assumed new trustees, who shall have declared their acceptance of the trust, or the Court have, on his application, after due intimation, appointed new trustees or a judicial factor;—(4) any trustee who is either retiring or has retired shall be bound to grant, at the expense of the trust, all deeds necessary to divest himself of the trust-property or convey it to the acting trustees or judicial factor. According to these Acts, a gratuitous trustee is entitled to resign; and a gratuitous trustee is one who receives no pecuniary or valuable consideration for performing the duties of trustee, and who, apart from his acceptance of the office, is under no special obligation to act. In this definition are included gratuitous trustees who are appointed or hold office *ex officio*.

1038. It is provided by 30 and 31 Vict. c. 97, sec. 2, that trustees shall in all cases where the same are not at variance with the terms and purposes of the trust, have power—(1) To appoint factors and law-agents, and to pay them a suitable remuneration. (2) To discharge trustees who have resigned, and the representatives of trustees who have died. (3) To grant leases of 21 years' duration of agricultural subjects, and 31 years' duration of minerals, and to remove tenants. (4) To uplift, discharge, and assign debts due to the trust-estate. (5) To compromise, or to submit and refer all claims connected with the trust-estate. (6) To grant all necessary deeds for carrying into effect the powers vested in them. (7) To pay the debts due by the truster or affecting the trust-estate, without

requiring constitution, where they are satisfied that they are proper debts of the trust. It is enacted by the same Act (sec. 3) that the Court may, on the application of the trustees, if they are satisfied that the same is expedient for the execution of the trust, or all the beneficiaries, without the authority of the Court, if of full age and capable of acting, grant to the trustees power—(1) To sell the trust-estate, or any part of it. (2) To grant feus or long leases of the estate, or any part of it. (3) To borrow money on the security of the estate, or any part of it. (4) To exchang any part of the trust-estate which is heritable.

1039. [The Act of 1867 applies solely to trusts in which the trustees act gratuitously. (Mackenzie, 1872, 10 M. 749.) It does not apply to an English trust possessing heritable property in Scotland. (Brockie, 1875, 2 R. 923.)]

## BOOK II.

OF THE RELATIONS BETWEEN INDEPENDENT  
MEMBERS OF THE COMMUNITY.

1040. The subject of trusts and trustees, belonging partly to the arrangements of the family, and partly to those between persons connected by no other ties than those of a common country, forms, as it were, a connecting link between what may be regarded as the two great natural divisions of Private Law. In passing from the contract of marriage, and its consequences in the domestic relations and the law of succession, to such contracts as sale, letting and hiring, insurance, partnership, agency and the like, we finally quit the family and its laws, and enter upon the arrangements by which intercourse is carried on between independent members of civilised communities.

1041. To the whole of this vast department, when regarded as exclusive of the relations of the citizen to the governing power, and using the words in a very comprehensive sense, the name of Mercantile Law may not inappropriately be given.

1042. From the extensive connection which they enjoyed with the Continent, the lawyers and merchants of Scotland become early acquainted with those commercial arrangements which the Lombards, and other trading communities of Italy and Spain in the south, and the members of the Hanseatic League (Innes's *Scotland in the Middle Ages*, pp. 151, 152, 164, and 170) in the north of Europe, had based on the principles which the Roman jurisprudence had borrowed from the maritime system of the Rhodians and other trading nations of antiquity. To this cause is to be ascribed the fact that the usages of trade were extensively known, and that down to the

period when the affairs of Scotland were thrown into confusion by the Rebellions of 1715 and 1745, mercantile law was cultivated in Scotland with much care and success. The learning of the feudal lawyers was called into prominent activity by the questions connected with the relations of superiors and vassals to which the numerous forfeitures which followed the Rebellions gave rise ; and it was not till the commencement of the present century that the mercantile law of moveables came again to be a leading object of study with Scottish lawyers. (On this interesting subject the reader is referred to the Introduction to the valuable Commentaries of the late Professor Bell, himself the leading authority on the Mercantile Law of Scotland.) The impulse which led to its revival was derived, not from the Continent, but from England, and from the vast increase in mercantile transactions to which the union with England gave rise ; but it must ever be a source of honest pride to reflect that this impulse originated with our own countrymen. Lord Mansfield, who has been called the father of the commercial law of England, was a Scotchman ; and two of the most illustrious of his disciples, in different branches of the same department, bore a name which places their Scottish origin beyond question.

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## CHAPTER I.

### OF THE CONSTITUTION OF CONTRACTS IN GENERAL.

1043. In treating of marriage, which in the eye of the law is simply a civil contract, and of the guardianship of those who are incapable of contracting, we had occasion to explain the nature of *consent*, which is the essence of all contracts. The subject will receive further illustration from the other contracts of which we are about to speak, and it will therefore be sufficient if we here recur to it very briefly.

1044. The consent which constitutes a legal obligation must be deliberate and voluntary. By requiring that it shall be deliberate, the law deprives all persons who are imbecile, whether from nonage, mental disease, or mental decay, of the power of entering into contracts; and by declaring that consent shall be voluntary, it deprives of the character of legal obligations all engagements which have been entered into from *error*, *force*, *fear*, or *fraud*. (Stair, i. 10. 13; Ersk. iii. 1. 16; Bell's Prin. 10; 1 Bell's Com., 5th ed., p. 294.)

1045. *Error* must be in essentials; that is to say, it must be of such a kind as may reasonably be presumed to have affected the consent. (Stair, *ut sup.*, and i. 9. 9; Ersk. *ut sup.*; Bell's Prin. 11; 1 Bell's Com. 294; Menzies, p. 65.)

1046. *Force* and *Fear* must be such as to overpower a mind of ordinary strength and firmness. A smaller amount of violence or intimidation will annul the engagement of a woman, a child, or a man in old age or in sickness, than of a man in health and vigour. (Stair, i. 9. 8; Ersk. iii. 1. 16, and iv. 1. 26; Bell's Prin. 12; 1 Bell's Com. 295; Menzies, 68.) It is always a question for the jury to determine whether there was reasonable ground for apprehension in the mind of the party alleging force and fear; and it is relevant to inquire into the whole circumstances and the relation of the parties to each other, such as master and servant, landlord and tenant, etc.

1047. *Fraud*.—A stratagem sufficient to deceive a person of ordinary capacity, and which has actually led to the engagement, will ground an action for reducing it. If, on the other hand, the fraud was only an accompaniment of a contract in which the parties would otherwise have engaged, it will, in certain cases, give rise only to an action of damages. Fraud may be perpetrated by false representation, by concealment, where there is a duty of disclosure incumbent on the party concealing, by underhand dealing, or by inducing imbecility by means of intoxication or otherwise. (Stair, i. 9. 9, 15; Ersk. iii. 1. 16, and iv.

1. 27 ; 1 Bell's Com. 297 and 240 *et seq.* ; Bell's Prin. 13 and 14 ; Menzies, p. 67 ; Broatch, 1866, 4 M. 1030 ; Foster, 1873, 11 M. 351.)

1048. The nullity which is created by the want of consent, in obligations entered into from error, force, or fraud, must be ascertained judicially ; all contracts ostensibly valid subsisting till they are reduced by an action at law. (Ersk. iii. 1. 16 ; Bell's Prin. 11, 12, 13, and note.) In a case of essential error, it has been held incompetent for the Court to reform the contract, and that the proper remedy is to reduce it. (Stewart's Trustees, 1875, 3 R. 192.)

1049. *Written Contracts*, strictly speaking, are such as are effectual only when written ; that is to say, in which writing is required not only in proof, but in solemnity. Of this description are all obligations relative to the transference of land and ships. (Stair, i. 10. 11, also sec. 9 ; Ersk. iii. 2. 1, 2 ; Bell's Prin. 18 ; 1 Bell's Com. 322.)

1050. The mode of attesting writings, whether written by another or by the grantor, has been already explained in treating of Wills. The same rules apply to written obligations of every description, whether unilateral or binding on more parties than one. The law takes no cognisance of mere purposes to engage. "The only act of the will," says Lord Stair, "which is efficacious, is that whereby the will conferreth or stateth a power of exaction in another, and thereby becomes engaged to that other to perform." (Stair, i. 10. 2.)

1051. *Locus Penitentiae*.—The right to *resile*, which a party who has not *completely* bound himself in an obligation in regard to which he has been negotiating, is called *locus penitentiae*. This right arises in regard to all agreements requiring writing for their completion, as a matter of *solemnity*, until writing shall have passed, as well as in regard to agreements which do not require such writing, in the event of parties having *stipulated* beforehand that writing shall be necessary to their completion, where

such stipulation is suspensive of the engagement till writing be alhibited, not where its effect is to bind the parties in the mean-while. This right does not, however, exist if things be not entire, excepting only in cases where the genius of our law refuses to order specific performance. As an instance of *locus penitentiae*, may be mentioned the power which belongs to either party of declining to contract a marriage after having signed a marriage-contract. In this, as in many similar instances, though the incomplete obligation cannot be enforced, it will give rise to an action of damages. (Stair, i. 10. 9; Ersk. iii. 2. 3, 4; Bell's Prin. 25; 1 Bell's Com. 327.)

1052. *Locus penitentiae* may be excluded by the course of acting of the party pleading it, subsequent to the engagement. (Ersk. *supra*.)

1053. *Rei Interventus* is an act on the part of the obligee, or person in whose favour the obligation is made, permitted by the obligor, or person obliging himself, on the faith of the agreement, whereby an alteration has taken place in the circumstances of the parties. (Ersk. iii. 2. 3; 1 Bell's Com. 328; Bell's Prin. 26; Menzies, p. 171.)

1054. *Homologation* is an act of the party obliging himself, or his representative, whereby an engagement in itself defective or informal is dealt with as binding. Homologation implies not only assent to the engagement, but full knowledge of its extent and consequences. (Stair, i. 10. 11; Ersk. iii. 3. 47, 48; Prin. iii. 3. 15; Bell's Prin. 27; 1 Bell's Com. 145; Menzies, 176.)

1055. *Immoral Contracts*, and such as are *inconsistent with public policy*, are void. Under these heads fall bonds imposing restraint on marriage: *e.g.* not to marry at all, or to marry a particular person named in the bond, or to be named by a third party; agreements for perpetual service; contracts for defeating the revenue laws, or inconsistent with the war policy of the country. But after smuggled goods are in circulation, the *bond*

*fide* purchaser will be allowed action for their delivery. (Ersk. i. 59. 60; Ersk. iii. 3. 3; Bell's Prin. 36. 43; 1 Bell's Com. 291 *et seq.*; Menzies, p. 47.) [The Court will not entertain an action to enforce delivery of an article won in a lottery which is illegal by Act of Parliament (Christison, 1881, 9 R. 34.)]

1056. *Gaming Debts and Wagers* cannot be enforced. This rule, as regards the former, is supported by the Gambling Acts 9 Anne, c. 14, and 1621, c. 14, and is extended to the latter by the common law of Scotland; in accordance with which it has been held "that courts were instituted to enforce the rights of parties arising from serious transactions, and can pay no regard to *sponsiones ludicræ*." The exclusion of such contracts by the common law of England is a view of the matter which several of the most distinguished of the English judges have regretted that it is "almost too late to adopt." But questions of law, which it will be competent for the courts to decide, may arise out of sporting transactions—*e.g.* where, at a coursing meeting, the stewards, as judges of the running, determined in favour of a certain dog, it was held competent for the Court to decide which of two parties had that interest in the winning dog which entitled him to the prize. (Bell's Prin. 36. 4; 1 Bell's Com. 299; Menzies, p. 49; *Graham v. Pollock*, Feb. 5, 1848.)

1057. *Contracts made on Sunday* are good in Scotland. (Bell's Prin. 44; Menzies, p. 63; *Oliphant*, 1662, M. 1500; see *Phillips*, Feb. 20, 1837, 2 S. and M'L. App. Ca. 465.)

1058. *Tippling Act*. — By 24 Geo. II. c. 40, sec. 12, it is enacted that "no person shall recover any sum of money, debt, or demand, on account of spirituous liquors, unless it shall have been *bonâ fide* contracted at one time to the amount of 20s. or upwards; nor shall any particular article in any account for distilled spirituous liquors be allowed, where the liquors delivered at one time shall not amount to the full value of 20s. at the least."

1059. This Act has been held to apply to wholesale as well as

retail dealers, and although the spirits be not consumed on the premises. It extends to spirits mixed with water, but not to wines. (Alexander and Co., March 10, 1824, 2 S. 788; Johnston, July 15, 1843, 5 D. 1372; Maitland, Nov. 14, 1848, 11 D. 71; Sep. Cas. xi. 71. In this case, it was the opinion of a majority of the whole judges that this enactment renders such furnishings positively illegal, and does not merely cut off the right of action.)

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## CHAPTER II.

## OF THE CONTRACT OF SALE.

1060. Sale is a contract whereby one of the parties becomes bound to transfer the property of an object to another for a specified price in current money, which that other becomes bound to pay for it. (Stair, i. 14, 1; Ersk. iii. 3. 2, 13; Bell's Prin. 85; 1 Bell's Com. 434.)

1061. If the price is to be paid in foreign coin, it must be in coin on which some determinate value has been set by the usages of exchange; otherwise the contract will be one of barter, not of sale. (Stair, *ut sup.*; Ersk. iii. 3. 4.)

1062. There must be a price, and a price not altogether illusory, for that would be donation, and not sale (Ersk. iii. 3. 4; Bell's Prin. 92; 1 Bell's Com. 437); but it is not necessary that the price should be adequate, though the fact of its being flagrantly the reverse would be an important adminicle of evidence in support of a plea of fraud. (Fairy, June 23, 1669, M. 14231; Sword, 1771, M. 14241; Wilson, June 14, 1859, 21 D. 957.)

1063. The contingent right to things not yet in existence may be sold, as the hope of a succession, the goodwill of a business or trade, the draught of a net, etc.; but not things the importation or use of which is absolutely forbidden. (Ersk. iii.

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3. 3.) The prohibition in such cases, however, must be express, as of diseased meat or unwholesome provisions, by the Police Acts.

1064. The intervention of writing is not necessary to the sale of merchandise or moveables in general ; but it is the only evidence that will be admitted to prove the sale—*1st*, of land (Stair, i. 10. 11, also 9 ; Ersk. iii. 2. 1, 2 ; Bell's Prin. 18) ; *2nd*, of ships (Bell's Prin. 1330 and 1457 ; 1 Bell's Com. 160) ; *3rd*, of copyright (Bell's Prin. 1360 and 1457) ; *4th*, of bonded goods in the importer's warehouse (Bell's Prin. 1306 and 1457 ; 1 Bell's Com. 190). Writing is also necessary wherever the parties have made it a condition of the sale that writing should pass.

### I. SALE OF MOVEABLES.

1065. 1. DELIVERY.—The contract of sale, like all other contracts, is perfected by consent alone ; and delivery on the one hand, and payment on the other, may therefore be legally enforced. Still, the property of the object sold was not considered by the law of Scotland to have passed to the buyer by the completion of the agreement, and, till delivery, it continued to be attachable by the creditors of the seller. This doctrine has been much qualified by the Mercantile Law Amendment Act (19 and 20 Vict. c. 60), which enacts (sec. 1), that “where goods have been sold, but the same have not yet been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser, or others in his right, from enforcing delivery of the same ; and the right of the purchaser to demand delivery of such goods shall, from and after the date of such sale, be attachable by, or transferable to, the creditors of the purchaser.”

1066. Notwithstanding the adoption of this rule, the important subjects of the transference of property and risk in sale cannot be said to be yet placed on a satisfactory or permanent footing. (See the elaborate judgment of the Lord Justice-Clerk in *Hansen v. Craig*, Feb. 4, 1859, and a very sensible article on the subject in the *Journal of Jurisprudence* for May 1859.) The principle towards which legislation seems to be tending is, that transference both of property and risk shall be held to have been effected in every case by the simple completion of the agreement irrespective of delivery altogether; and that the agreement shall be held to be complete, and to possess the full characteristics of a contract, if, 1st, the price be fixed or discoverable; and, 2nd, if the object itself be in existence, or its quantity and quality ascertained or ascertainable. When this principle is fixed, questions of transference will become questions not of law, but of fact. But this principle has not as yet received full judicial recognition, and it is safer in the meantime to hold that the enactment has made no change in our previous law of sale beyond its express terms. In the case of *Hansen*, referred to above, though subsequent by more than two years to the date of the statute, the Lord Justice-Clerk (Inglis) observed, "By the Roman law and ours, no property can pass to the buyer without delivery, actual or constructive." [Among recent cases on the subject of the last two sections are—*Orr's Tr.*, 1870, 8 M. 936; *Cropper*, 1880, 7 R. 1108; *M'Bain*, 1881, 6 R. 360; aff. *ib.* H. L. 107; *McCauley's Tr.*, 1883, 10 R. 1064.]

1067. At present, the following seem to be the rules most generally recognised by the Court:—

1068. (1.) If a specific object, already possessing a separate existence, and of known quantity, be sold for a specific price, the right to that thing has been conferred on the buyer, and it henceforth lies for delivery with the seller at the buyer's risk. (*Stair*, i. 14. 7; *Ersk.* iii. 3. 7; *Bell's Prin.* 87; *Bell's Com.*

437.) Sec. 1 of the Act above quoted has been held, for example, not to apply to a running contract, by which a ship-builder sold all the scrap iron he then had on stock, and all that might be produced by him during a certain period, on the ground that it did not confer a right to a specific thing. (M'Meekin, 1876, 4 R. 154.)

1069. (2.) If, on the contrary, a certain number or quantity, described by weight or measure, be sold for a specified price, either without reference to any particular stock of which it forms part, or with reference to a particular stock from which it has not yet been separated, no specific right has been conferred, and the risk remains with the seller. (Stair, i. 14. 7; Ersk. iii. 3. 7; Brown on Sale, 44; Bell's Prin. 91 (2); Bell's Com. 437.)

1070. (3.) The same is the case, though the object be specific, if its quantity be unascertained; *e.g.* if a cask of wine, of unascertained quantity, be sold at so much a gallon or so much a quarter, the corpus of the subject is not so specific or the price so fixed as to complete the contract or transfer the risk. (Bell's Prin. *ib.*) The ground on which the case of *Hansen v. Craig* (*ut sup.*) was held to be an exception to this rule was, that "within the contract itself there was a statement of particulars which enable any man, without going beyond the contract, by a simple arithmetical process, to ascertain the cumulo price for himself."

1071. (4.) As regards the price, Mr. Bell seems to have stated the received doctrine when he says, "The price must be certain, or referred to such standard or criterion as to fix it beyond question, as to the sheriff-fiars fixing the price of grain, or the award of a third party, or even of one of the parties, subject to the control of equity, or the market or current price at a particular time or place." (Prin. 92.) Sometimes such a standard will be pronounced—as, for example, where goods have been sold and consumed, and a dispute arises as to the

price, if evidence be wanting, the Court will fix it at the market value. (Ib.)

1072. (5.) But the seller's risk is continued, even as regards a specific object, if he has either committed a fault in delaying to deliver (Stair, i. 14. 7 ; Ersk. iii. 3. 7 ; Bell's Prin. 88 and 117), or if, by undertaking to deliver at a certain place, he has come under an implied obligation to bear the risk till delivery. (Spence, Jan. 25, 1687, M. 3153 ; Miln and Co., Feb. 1, 1809, F. C.) In either case, the buyer will be entitled to demand not only restitution of the price, but damages for any loss which the want of the article may have occasioned, even though it should have perished by an accident over which the seller had no control.

1073. (6.) If the time and manner of delivery be stipulated, these, by force of stipulation, are *inter essentialia* of the contract, and the contract will be violated unless the stipulations be complied with.

1074. (7.) If there are no stipulations on these points, delivery must be made in a reasonable manner, and within a reasonable time after the price has been paid. (Cooper, 1791, M. 10100.) Wherever an established usage of trade can be discovered, it will govern the time and manner of delivery in the absence of express stipulations. If no place of delivery be fixed, the general rule is, that it shall be where the goods are at the time of the purchase ; and if the buyer be at a distance, the seller's duty and risk end with delivery to the proper carrier. (Bell's Prin. 117.)

1075. *Delivery is either Actual or Constructive.*—The forms which have been established for the symbolical delivery which the law, till recently, required in the transference of heritable property, will be explained under Sale of Heritage.

1076. Actual delivery of moveables may be effected in many other ways than by simply placing the commodity in the hands of the purchaser :—

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1077. (1.) It may be delivered to his clerk, his servant, or his authorized and known agent. (Bell's Prin. 1302 ; 1 Bell's Com. 173.)

1078. (2.) It may be placed in his warehouse, or his cart, or his vessel ; and these may be either in charge of his own servants, or of others hired by him for the purpose of receiving the goods. (Collins, 1804 ; Morrison, 14223.)

1079. (3.) It may be delivered into the warehouse of a wharfinger whom the buyer is accustomed to employ, or into the Queen's warehouse for his behoof. (Richardson, 3 Bos. and Pul. 127 ; Leeds, ib. 326 ; Scott, ib. 469 ; Strachan, Jan. 21, 1817, F. C.)

1080. (4.) The key of the warehouse, cellar, or other place of deposit where the goods are kept, may be delivered to him or to his accredited servant or agent. (Maxwell and Co., April 4, 1831, 5 W. S. 279.) Or,

1081. (5.) Real delivery may be effected by any other means by which the commodity is placed in the power of the buyer, and beyond the power of the seller, provided this be done either at the seller's instance or with his consent.

1082. *Constructive Delivery* will be effected—

1083. (1.) By marking the goods—*e.g.* trees, cattle, or the like—with the peculiar mark which he employs in his trade. In the case of cattle, it is desirable that they be removed to a field not belonging to the vendor. (Bell's Prin. 1303 ; Lang, July 6, 1832, 11 S. 777 ; Gibson, July 9, 1833, 11 S. 916 ; Mathison, Dec. 3, 1854, 17 D. 274.)

1084. (2.) By setting apart the goods in the seller's warehouse, and charging warehouse rent for them, with the buyer's knowledge and consent.

1085. (3.) By intimating a delivery order to a third party acting as custodier of the goods, or having them transferred in his books from the name of the seller to that of the buyer ; or by any other means commonly recognised as delivery in the

branch of trade to which the transaction belongs. (Bell's Prin. 1305.) In all these cases payment of the price is also essential.

1086. *Failure to Deliver*.—If the seller fail to deliver, the buyer has three courses open to him : He may—*1st*, Annul the bargain, and so end the matter ; *2nd*, Insist for performance, and damages for delay ; or *3rd*, If performance could no longer serve his purpose, he may insist for damages for non-performance ; and it is sufficient to prove trouble and inconvenience though he cannot prove specific damage. (Webster, 1875, 2 R. 752.)

1087. 2. IMPLIED CONDITIONS OF SALE.—(1.) The usages of trade, if not expressly excluded, are implied conditions in sale as in all other mercantile contracts. For example, a sale without specific conditions implies the credit usually given in the line of trade under which it falls. (Bell's Prin. 101 ; Bell's Com. 440 ; Sheriff, Nov. 21, 1828, 7 S. 47 ; Stewart, Feb. 17, 1831, 9 S. 466.)

1088. (2.) No local usage or custom will be admitted if it may reasonably be supposed to have been unknown to one of the parties ; and it falls on the party pleading it to show that it was known to the other party. (Bell's Prin. *ib.* ; Bell's Com. *ib.* ; Holman, 1878, 5 R. 657, Lord President.)

1089. (3.) *Weights and Measures*.—All British sales are ruled by the imperial weights and measures ; all local and customary measures having been finally abolished by 5 and 6 Will. iv. c. 63. This statute is repealed by the "Weights and Measures Act, 1878" (41 and 42 Vict. c. 49), but its provisions, as far as given in the following sections, are re-enacted by the latter Act. All articles sold by weight must be sold by avoirdupois weight, with the exception of the precious metals, and articles made of them, and precious stones, which may be sold by troy weight, and of drugs, which may be retailed by apothecaries' weight.

1090. It is provided by that statute, that any one selling by any measure other than the imperial measures, or some multiple

or part of such measures, shall be liable in a penalty not exceeding forty shillings for every such sale. But it is declared that this provision shall not prevent the sale of any articles in any vessel not represented as containing any amount of imperial measure, or any fixed local or customary measure heretofore in use. [But it is not a breach of the statute to sell by measures—which are not imperial measures—of different sizes at different prices, provided the sale is not represented as one by imperial measure. (Craig, 1883, 10 R. C. J. 51.)]

1091. All weights and measures are ordered to be stamped, the weights on the top or side, the measures of capacity on the outside; and it is enacted that they shall not be stamped or used for trade if made of lead or pewter, unless they be wholly and substantially cased with brass.

1092. The fiars prices in Scotland must be struck by the imperial measure.

1093. All powers and duties relative to the standards of measure and weight, and the custody and verification thereof, are vested in the Board of Trade as the central administration. The justices of the peace in counties, and the magistrates in towns, are instructed to provide local standards for comparison by way of verification or inspection of all weights and measures there in use. A local standard to be legal must have been verified or reverified, a standard of weight within five and one of measure within ten, years before being used. The comparison may be made with another local standard, or with that of the Board of Trade. The same authority has power to appoint inspectors for the safe custody of such standards, and for the other purposes of the Act, and to allot to each inspector a separate district.

1094. The justices and magistrates are to provide the means of verifying and stamping weights and measures for the use of the inspectors; and determine on what days and at what times and places they are to attend, with the standards in their

custody, for the purpose of examining, comparing, and stamping, if found correct, all such weights and measures as may be brought to them.

1095. Every person who shall be found, on complaint of a third party, to use any weight or measure other than those authorized by the Act, and stamped according to its provisions, or which shall be found to be light or otherwise unjust, shall forfeit a sum not exceeding five, or for a second offence ten, pounds; and *any contract or sale made by such weights or measures shall be wholly null and void.* The market value of goods so sold may be recovered, though not the contract price; but it is thought that, apart from evidence, the contract price would be deemed to be the market value. (*Henderson v. Davidson*, July 8, 1871, 8 S. L. R. 633.)

1096. It shall be lawful for every justice or magistrate, and for any inspector appointed and authorized in writing by them, at all reasonable times, to enter any place, whether a building or in the open air, whether open or enclosed, and there to examine all weights and measures; and if it shall appear that the weights or measures are light, or otherwise unjust, they shall be seized, and the person in whose possession the same shall be found shall forfeit a sum not exceeding five pounds.

1097. The same penalty is imposed upon those who shall refuse to produce their weights, or shall otherwise obstruct the examination.

1098. Penalties are likewise imposed, at the instance of the procurator-fiscal or any person who prosecutes, on inspectors for the negligent or dishonest discharge of their duties; and it is provided that in both cases the penalties shall be recoverable before a sheriff, or two or more justices or magistrates of any burgh in which the offence is committed.

1099. Any person found liable in a penalty summarily under the Act may, failing payment within a specified time, be imprisoned for sixty days.

1100. The penalties are directed to be applied, when recovered in the Sheriff Court, on behalf of her Majesty; when in the Justice of Peace Court, in aid of the County General Assessment; when in the Burgh Court, in aid of the funds of the burgh; when in the Police Court, in aid of the police funds.

1101. An appeal lies to the Court of Justiciary.

1102. (5.) If an order be given for several articles, it is an implied condition that the whole shall be sent, and the buyer is entitled to refuse a portion of the order. (Bell's Prin. 91; Bell's Ill. i. 94; Champion, 1 Camp. 53; Baldy, 2 Barn. and Cress. 37.)

1103. (6.) Where the buyer has seen and examined the goods, the maxim, that the "buyer's eye is his merchant," holds both in Scotland and England; and the subject cannot be refused unless either special warranty, sale for a special purpose, or fraud, be proved. (Stair, i. 9. 10; Ersk. iii. 3. 10; Bell's Prin. 96.)

1104. It will be considered fraud if the seller knew of a material latent defect and concealed it, or if he framed a statement calculated to mislead. (Stair, *ut supra*; Bell's Ill. i. 98, and iii. 105, 106; Bell's Prin. 96.) There is to this extent, by the law of Scotland, notwithstanding the limitations to implied warranty introduced by the Mercantile Law Amendment Act, sec. 5, an implied warranty where the fault is latent, and known to the seller, even where the purchaser has seen the goods.

1105. The customary commendations bestowed on their commodities by tradesmen will not be regarded as fraudulent statements, so long as they are simply extravagant in degree. But if positively at variance with facts known to the seller, they will not be permitted to enjoy the protection which custom has extended to mere "puffing." (*Vide infra*, Special Warranty.)

1106. (7.) Where goods are sold by sample, they may be

rejected on implied warrandice, if they do not, on delivery, correspond with the sample. (Ib. 98; Van Oppen, Nov. 28, 1855, Session Cases, xviii. 113.)

1107. (8.) When the goods are afterwards to be furnished to the buyer, and no sample is exhibited, they may be rejected if they do not possess the ordinary merchantable character of the commodity. (Bell's Prin. 98; 1 Bell's Com. 441; Watt, Feb. 6, 1829, 7 S. 372; Whealler, Jan. 9, 1843, 5 D. 402; Van Oppen, Nov. 28, 1855.)

1108. *Warrant under Trade Mark.*—By 25 and 26 Vict. c. 88, sec. 19 and 20, the vendor of any article under a trade mark or description is held to warrant that the mark or description is genuine, unless the contrary is expressed in a signed writing delivered to and accepted by the vendee.

1109. If the buyer does not make his challenge immediately, or at least without unreasonable delay, it will not free him from the contract. Where the fault is manifest, and the commodity is of a kind to be injured by keeping, the challenge must be instantly made. Sometimes, by the custom of the particular trade, a certain time is allowed for examination. (Stair, i 10. 15; Ersk. iii. 3. 10; Bell's Prin. 99; 1 Bell's Com. 439.)

1110. [*Neutral Custody.*—Where the rejection of an article, as not according to bargain, has been timeously intimated by the buyer, and the seller refuses to take it back, it is then, in certain cases, incumbent on the former, if he wishes to preserve his claim against the latter, with all reasonable speed to put the article into neutral custody—*e.g.* goods into a warehouse, or a horse into a livery stable. This obligation depends, however, on the article being of a character or class or in a condition liable to deteriorate more or less rapidly from lapse of time. What would not be necessary in the case of plate, pictures, or books, would be so in that of perishable goods, such as fruit or vegetables, or a horse suffering from disease. (Cal. Ry. Co.,

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1882, 10 R. 63.) What constitutes timeous intimation is a question of circumstances in each individual case.]

1111. (9.) Solvency is an implied condition where sale is on credit; and if the buyer fail, or be *vergens ad inopiam*, the seller may refuse to proceed. (Bell's Prin. 100.)

1112. 3. EXPRESS CONDITIONS OF SALE.—Any conditions may be introduced by positive stipulation, provided they be neither illegal nor impossible.

1113. (1.) A special condition of "ready money" suspends the passing of the property even in questions with creditors. (Stair, i. 14. 4 and 5; Ersk. iii. 3. 11; Bell's Prin. 103 and 109; Brodie v. Tod and Co., May 20, 1814, F. C.) It is supposed that, under such a stipulation by the seller, goods sold but not delivered would be attachable by the seller's creditors, notwithstanding the 1st clause of the Mercantile Law Amendment Act. (19 and 20 Vict. c. 60.)

1114. (2.) If the agreement be, that "a bill shall be given for the price," it is sufficient if the bill be sent after reasonable time has been taken to examine the goods. (Bell's Prin. 104.)

1115. (3.) If the agreement be, that the bill shall "be sent in course," the stipulation must be literally fulfilled. (Bell's Prin. 104; 1 Bell's Com. 441.)

1116. (4.) If a discountable bill be stipulated, the bill must be such as will at once produce money at the banks. (Bell's Prin. 106; 1 Bell's Com. 441.)

1117. (5.) An "approved bill" is one to which no reasonable objection can be made,—not a bill to be approved or rejected at the caprice of the seller. (Bell's Prin. 107; Hodgson v. Davies, 2 Camp. 532.)

1118. (6.) If a "bill" be stipulated for, it is held to be the buyer's own bill; and the seller may object to his credit—*1st*, If the sale has been effected by a broker, and on inquiry

he finds the buyer's credit insufficient. In this case, however, there must be no undue delay in intimating his dissent. *2nd*, If the buyer's circumstances have been concealed; or *3rd*, If they have changed for the worse during the time between the bargain and the tendering of the bill. (Bell's Prin. 105; Bell's Ill. i. 106.)

1119. (7.) Where the goods are sold "on arrival of a certain ship," there is no sale if the ship perish. (Bell's Prin. 108.)

1120. (8.) Where the delivery is to be "on arrival, not beyond a certain day," there is no bargain unless the goods arrive in time for delivery. (Bell's Ill. i. 107; Bell's Prin. 108.)

1121. 4. SALE AND RETURN.—This is either a sale conditional on approval generally, or within a specified time; or an arrangement between wholesale and retail dealers (as between publishers and booksellers), where goods are sent to the latter on the understanding that those articles only are to be transferred which they can dispose of. (1 Bell's Com. 269; Bell's Prin. 109; More's Stair, p. lxxxviii.)

1122. 5. SPECIAL WARRANTIES.—One of the leading objects of the Mercantile Law Amendment Act was to assimilate the law of Scotland to that of England as regarded warranties.

1123. The clause which has reference to this important subject is the following:—

1124. "§ 5. Where goods shall, after the passing of this Act, be sold, the seller, if at the time of the sale he was without knowledge that the same were defective or of bad quality, shall not be held to have warranted their quality or sufficiency, but the goods, with all faults, shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty,

to warrant that the same are fit for such purpose." But the provisions of the statute as to goods sold in ignorance of defect or bad quality, being with all faults at the risk of the purchaser, unless there was express warranty, or unless they were sold for a specified and particular purpose, do not apply to cases where the goods *sent* do not answer the description of the goods sold. [(See Hamilton, 1878, 5 R. 839.)]

1125. *Horses*.—It has been held (*Young v. Giffen*, Dec. 4, 1858) that the word "goods" in this section includes "horses and other animals." The implied warrandice of soundness from serious defects, under which they have hitherto been sold in Scotland, is thus swept away, and the English practice of express warranty introduced. It will therefore be necessary in future that the pursuer allege express warranty. (*Robeson*, 1874, 2 R. 63; *Mackie*, *ib.* 115; *Rough*, 1875, *ib.* 529. [*Hamilton*, *ut sup.*; *Gardiner*, 1880, 7 R. 612.]])

1126. 6. PAYMENT must be in cash, if insisted on. (*Bell's Prin.* 127.)

1127. When the buyer's bill, or note, or cheque, is taken in payment, he will not be discharged if it be dishonoured. (*Bell's Prin.*; *Everet*, 2 *Camp.* 515.)

1128. But when bank notes, or the bill or the note of a third party is taken, without indorsation or recourse on the buyer, the seller has no remedy if they should prove bad by insolvency of the bank or third party. The reverse will be the case if the buyer knew of the insolvency, or omitted any observance necessary for procuring payment. (*Bell's Prin.* 127; *Camidge*, 6 *Barn. and Cress.* 373; *Read v. Hutchinson*, 3 *Camp.* 352.)

1129. If, on presenting the buyer's bank cheque, the seller agree to receive as payment a bill on a third party, the buyer is discharged though that bill be afterwards dishonoured. (*Bell's Prin.*; *Smith*, 7 *Barn. and Cress.* 19; *Alderson*, 3 *Barn. and Adolph.* 660.)

1130. If the buyer refuse to take delivery, he will be liable in warehouse rent or damages to the seller. (Bell's Prin. 128 ; 1 Bell's Com. 443.)

1131. 7. OF STOPPAGE IN TRANSITU AND RETENTION OF GOODS BY THE SELLER.—The English rule, that goods the price of which has not been paid may be arrested in the course of their transit, either to the seller himself or to the destination which he has assigned them, if they be still in the hands of a *middleman*, was introduced into Scotland by a decision of the House of Lords towards the end of last century. (Allan, Stewart, and Co. v. Stein's Creditors, Dec. 4, 1788, and Dec. 23, 1790, M. 4949.) This was a complete revolution in principle, and seems to imply the logical inconsistency, that goods once delivered may, in certain circumstances, be restored to the seller as if he had never lost possession. The old law, if not quite so equitable, was certainly more intelligible and more self-consistent. It held that the impending bankruptcy of the purchaser must be treated as known to himself ; and therefore, on the ground of *presumptive* fraud, allowed restitution within three days of bankruptcy, even where the goods had passed into the hands of the purchaser. This doctrine was certainly capable of more extensive application—and it may fairly be questioned whether it was not even more equitable—than the doctrine of stoppage *in transitu*. (Bell's Com. 207.)

1132. The doctrine of stoppage *in transitu* was first introduced in England in a Chancery case (Wiseman v. Vandeput, 1790), and has since come to be recognised in the common law courts. The reader is referred to a note by Mr. M'Laren, on page 229 of his edition of Bell's Commentaries, where the true principle on which the doctrine rests is ably discussed. It seems pretty clear that the goods must be in *course of transit* from the seller to the buyer, though not necessarily in motion, and that the party charged with the transit must have the goods in his hands

merely in the capacity of *forwarding* agent. If the goods are still in the hands of the seller or his agent,—in other words, if there has been neither *actual* nor *constructive* delivery,—the seller cannot have recourse to the remedy of stoppage *in transitu*, for the very obvious reason that he can *retain* them. (See Bell's Prin., 7th ed., 1303, note k, and 1309 A.)

1133. The right of stopping exists only in the seller himself (Bell's Prin. 1308; *Butler v. Woolcot*, 2 New Rep., in Com. Pl. 64), not in his creditors, nor in any factor, cautioner, or other person possessing only an incidental interest in the transaction; but a person sending goods to be sold on the joint account of himself and the consignee is entitled to stop them. By the Mercantile Law Amendment Act, 19 and 20 Vict. c. 60, the same rule has been adopted with reference to the retention of goods still in the custody of the seller. (*Supra*, sec. 1088.)

1134. By the second edition of that Act it is declared, that "the seller himself shall not be entitled to a right of retention against a second or any subsequent purchaser; but with this proviso, that nothing in this Act shall prejudice or affect the right of retention of the seller for payment of the purchase price of the goods sold, or such portion thereof as may remain unpaid, or for the performance of the obligations or conditions of the contract of sale, or any right of retention competent to the seller, except as between him and the subsequent purchaser, or any such right of retention arising from express contract with the original purchaser."

1135. By section 4 the seller's rights are guaranteed against the original purchaser. "Any seller of goods may attach the same while in his own hands or possession, by arrestment or pouncing, at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller."

1136. The landlord's right of hypothec and sequestration for rent are saved from the operation of the statute. (Sec. 4.)

1137. The payment of a part of the price does not take away the right to retain or to stop, neither does the delivery of a part take away that right as regards the remainder. (Bell's Ill. i. 405; Bell's Prin. 1308; Com. 222; Hodgson, 7 T. R. 440.) Absolute bankruptcy of the buyer is not required. Insolvency, or such a change of circumstances as to justify a suspicion of the solvency, is sufficient to justify the seller in retaining or stopping delivery. (1 Bell's Com. 223; Paton on Stoppage in Transitu, p. 18, and cases cited.) If the goods are delivered to the clerks, servants, warehousemen, shipmasters, or other persons acting as the *hands* of the buyer, the right of stoppage is at an end. Goods still in the seller's warehouse, or in the hands of his people, may be retained, although he have given a delivery order to the buyer. (Bell's Prin. 1308; Bell's Com. 212.)

1138. The following may be enumerated as middlemen, or persons in whose hands goods may be stopped:—1. Carriers by land or water; 2. packers; 3. wharfingers; 4. warehousemen; 5. porters and all others employed in the carrying trade. (Bell's Prin. 1308; 1 Bell's Com. 213.)

1139. A middleman may, by special arrangement, become the agent of the buyer—*e.g.* where a wharfinger's warehouse is made the final repository of the goods, or where a carrier has been directed to keep the goods for the accommodation of the buyer, —and in this case there is no stoppage. (Bell's Prin. 1308; Bell's Com. 221.)

1140. The transit will further be held to be at an end in the following cases:—

1141. 1<sup>st</sup>, Where goods are delivered to a wharfinger or to the keeper of a warehouse with a delivery note to the buyer. 2<sup>nd</sup>, Where the goods are entered in the books of the warehouseman or wharfinger in the buyer's name, and generally where the goods simply abide the orders of the buyer. (Bell's Prin. 1308; 1 Bell's Com. 213.)

1142. It is often very important for the purposes of trade that

the buyer shall have it in his power to dispose of the goods before their arrival ; and sales of goods while at sea are consequently accomplished by transferring the bills of lading, which are negotiable documents like bills of exchange. This object could not be attained unless those bills of lading gave an unconditional power of disposal ; and it has, after much doubt, been recognised as the rule of law, as it had long been that of mercantile usage, that the consignee, by the indorsation of his bill of lading for value, without notice, confers on the indorsee an absolute right, thus depriving the consigner of his right of stopping *in transitu*. The bill of lading, of course, must be honestly assignable, and the whole transaction in the fair course of ordinary mercantile dealing. It must be kept in view, that if a factor for the consignee acquire on *general account* merely, the right to stop *in transitu* is not barred. If the law of a foreign country allow stoppage before the goods have left port (and the laws of most countries do), the assignee to the bill of lading is in no better position than the cedent. (Bell's Prin. 419 and 1308 ; 1 Bell's Com. 213 ; Bogle, Feb. 2, 1787, M. 14216 ; Todd, Feb. 1, 1809, F. C. ; Stoppel and Son, Feb. 20, 1849, 11 D. 676 ; and Nov. 15, 1850, 13 D. 61 ; see *Leckbarrow v. Mason*, 3 C. and B. 637 ; *Morton and Co.*, 1858, 20 D. 362.)

1143. In opposition to the English practice, a bankrupt in Scotland is not only entitled to decline to accept of goods, even when constructively delivered, but it has been regarded as amounting to fraud on his part and on that of his creditors, if, after bankruptcy, they take delivery of goods which they know to be still subject to stoppage. (Bell's Prin. 1310 ; 1 Bell's Com. 232 ; see *Stein v. Hutchison*, Nov. 16, 1810, F. C.)

1144. *Modes of Stopping*.—No specific form or solemnity is necessary. The most complete stoppage will be either by the presentment of a bill of lading to the shipmaster, or by the warrant of a judge ; but a private countermand will suffice, even though verbal. (Bell's Prin. 1309 ; 1 Bell's Com. 226.)

1145. Physical possession of the goods, even by the buyer himself, will not prevent stoppage or recovery, if he have failed to perform an express and absolute condition attached to the delivery ; *e.g.* that the price should be paid at the time, or a bill given. (1 Bell's Com. 223 ; *Bothlingk v. Scheider*, 3 Cap. 58.)

1146. When the goods have been delivered by mistake, after an order to stop has been received by the carrier, restitution may still be obtained. (Bell's Prin. 229.)

## II. SALE OF SHIPS.

1147. The transference and burdening of property in ships is now regulated by "the Merchant Shipping Act of 1854." (17 and 18 Vict. c. 104.)

1148. By sec. 19 it is provided that every British ship, except certain small coasting and fishing vessels, shall be registered, her name, tonnage, length, area, and the names and descriptions of her owner or owners ; and if there be more than one owner, the proportions in which they are interested in the ship shall be set forth in the manner provided by the Act.

1149. The collector, controller, or other principal officer of Customs is appointed registrar at any port or place in the United Kingdom or Isle of Man ; and beyond these limits it is usually the governor or lieutenant-governor of a colony, in conjunction with the officers of Customs. (Sec. 30.)

1150. Applications for registry shall be made by the person or persons requiring to be registered as owners, or by an agent authorized in writing ; and a declaration of ownership and other particulars regarding the ship, shall be made by the applicant and subscribed before the registrar or a justice of the peace. (Secs. 35, 38.) In addition to the declaration, ownership must be established by a certificate from the builder. (Sec. 40.) Upon the completion of the registry, a certificate or extract of the registration shall be granted by the registrar.

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1151. Any change which takes place in the registered ownership shall be indorsed on the certificate by the proper registrar at the port where the ship chances to be at the time. (Sec. 45.)

1152. *Transference*.—By sec. 55 it is enacted, that when a registered ship, or any share therein, is to be disposed of, it shall be transferred by bill of sale. Such bill of sale shall contain a description sufficient to identify the ship to the satisfaction of the registrar, and shall be executed by the transferer in the presence of, and be attested by, one or more witnesses. (Sec. 55.) The bill of sale must be delivered before the property of the ship is transferred (Granfelt, 1874, 1 Rettie, 782); [but thereby, and by possession following thereupon, the property is effectually vested in the purchaser so as to secure him against, *e.g.*, the sequestration of the seller while the latter is still registered as owner (Watson, 1879, 6 R. 1247)].

1153. A declaration having been made by the transferee, to the effect that he is entitled to be an owner of a British ship (sec. 56), “the bill of sale shall be produced to the registrar of the port at which the ship is registered, together with the declaration of the transferee; and the registrar shall enter in the register book the name of the transferee as owner of the ship or share contained in the bill of sale, and shall indorse on the bill of sale the fact of such entry having been made, with the date and hour thereof; and all bills of sale shall be entered in the order of their production to the registrar.” (Sec. 57.)

1154. Similar regulations are introduced for the transmission of ships or shares in consequence of death, bankruptcy, or marriage.

1155. By sec. 66 a form of “mortgage” is provided, and it is directed that, on the production of such instrument, the registrar of the port at which the ship is registered shall record the same in the register book.

1156. By subsequent clauses, provisions are made for the transference of mortgages, whether by sale or in consequence of

death, bankruptcy, or marriage; and it is enacted that the mortgages shall be entitled to priority as documents of debt, according to the date at which they are recorded in the register book, and not according to their own dates.

### III. SALE OF HERITAGE.

1157. The sale of heritable property, in so far as it is a contract between buyer and seller, is regulated by the principles of the contract of sale already explained.

1158. Writing is indispensable to its constitution (Ersk. iii. 2. 2; Bell's Prin. 889; Menzies, p. 827); and, as some time must elapse before the titles of the seller can be examined and the formal conveyance executed, it is customary for the parties either to execute a formal minute of sale, or to interchange written missives, fixing the conditions of the bargain. A complete contract is thus constituted. If not holograph of the parties, missives of sale must be authenticated like other probative deeds; and a minute of sale ought always to be a regular deed, written on stamped paper, with a clause of registration for diligence, and a testing clause. When missives of sale are not written on stamped paper, they must be stamped afterwards, before they can be founded on in a court of law. Where minutes of sale or missives are informal, the ordinary rules of *locus penitentiae*, *rei interventus*, and homologation apply to them (Ersk. iii. 2. 2; Bell's Prin. 889; Menzies, 828).

#### 1. *Constitution and Transmission of Heritable Rights.*

1159. The constitution of heritable rights, and their formal transmission, whether by inheritance or purchase, are still regulated in some degree, both in this country and in England, in accordance with the relations which subsisted between the overlord, or feudal superior, and his vassal, in a condition of society which for centuries has ceased to exist.

1160. It would be difficult to assign any purpose which the feudal system has served for many generations, except that of complicating the titles of heritable proprietors, and increasing the expense, and not unfrequently the risk, attending their transmission. So strongly, indeed, have the inconveniences of our law of heritable property been felt, that in almost every session in recent years, Parliament has effected some fresh innovation on its provisions. Still the skeleton of the feudal system has been permitted to remain; and, as an existing institution, must be placed in outline before the reader.

## 2. *Constitution of Feudal Rights.*

1161. He who makes a grant is called the superior; he who receives it, the vassal. The subject of the grant is the feu,<sup>1</sup> a word which, however, is sometimes used in a more special sense.

1162. According to the theory of the feudal system, the sovereign was the actual possessor, in the first instance, of the whole land of the nation; by him it was granted to his vassals on conditions of military service; and by them to sub-vassals on the like conditions. The system of subinfeudation in Scotland was permitted to extend *ad infinitum*, notwithstanding an

<sup>1</sup> The origin of the word feu or feud has been a subject of much discussion amongst etymologists. By some, it is derived from the Latin *fides*, and *ead*, or *odh*, or *od*, Teutonic words, signifying a property or estate in land; whilst by others, and with perhaps greater probability, the whole word is maintained to be Teutonic, equivalent to *vieh*, cattle, ultimately from the same root with the Latin *pecus*, which, in the form of *pecunia*, came to signify property, and its representative money,—because, as Varro remarks, property amongst pastoral nations consisted of cattle. (Varr. *De Lingua Latina*, 5, 10, sec. 95, ed. Mull.) A feu or feudum, in this sense, would be a piece of land held for a pecuniary consideration, using *pecuniary* in the wide sense which its etymology suggests. See the merits of the two suggestions discussed in the article on the *Feudal System* in Chambers's new Encyclopædia.

alleged attempt to abolish it so early as the reign of Robert I. (Menzies' Lectures on Conveyancing, p. 583.) In England, subinfeudation was prohibited by statute so early as the year 1290 (*Quia emptores*, 18 Ed. I. c. 1); the vassal being permitted to dispose of his rights only by putting the purchaser in his place, and enabling him to hold directly of the superior.

1163. In Scotland, heritage has always been transmissible by either of these methods. Where the system of subinfeudation is adopted, a new right of property is brought into existence at each stage of the transmission; and this is called *constituting a fee*. The formal instrument by which a fee is constituted, and a new feu created, is called a *feu-charter*; that by which it is transmitted is called a *disposition*.

1164. When a fee is constituted, a certain interest in it is always retained by the superior. This interest is called the *superiority*, or *dominium directum*; as opposed to the more substantial interest transmitted to the vassal, which is called the *property*, or *dominium utile*.

1165. In the earlier stages of feudalism the vassal was chosen by the overlord on the ground of his aptitude for military service, and the feu was granted him merely for life. After the feu became hereditary, the superior was in the habit of resuming possession during the minority of the vassal, on the ground that he was then unable to discharge his military duties. The value of this right on the superior's part was commuted for an annual payment, after the relation between him and the vassal had become pecuniary. This arrangement was called *taxed ward*.

1166. These military tenures were abolished in Scotland in 1747, as dangerous to public tranquillity; by 20 Geo. II. c. 50, and 25 Geo. II. c. 20, those held of the Crown being converted into *blench* or *blanch holdings*, and those held of subjects into *feu holdings*.

1167. A blench holding involved the payment of a merely nominal sum—*e.g.* a rose, a penny Scotch, a peppercorn, or the

like, if asked only (*si petatur tantum*); i.e. it was as nearly a free estate as the theory of the feudal system permitted. An estate absolutely free was called allodial, which is defined by Lord Stair to be that "whereby the right is without recognisance, or acknowledgment of a superior." Moveables, he says, are so enjoyed, "and lands and immoveables were so till those feudal customs." (ii. 3. 4.)

1168. A holding in feu farm, on the other hand, involved the payment of a valuable consideration, the extent of which was matter of arrangement between the parties. These latter are the ordinary *feu-duties* of the present day.

1169. In addition to the dues thus paid for the recognition of his right, certain occasional payments, called *casualties*, were made by the vassal to the superior. The only casualties now in use (i.e. in feus granted prior to 1st Oct. 1874, see next section) are those which are payable to the superior in consequence of the transmission of the feu, by sale or succession, to a new vassal. When an heir succeeds to a feu, he is bound for the casualty of *relief*; in other words, he must pay a duplicate of the duty *blench* or *feu*, as the case may be, for the first year of his entry. A purchaser is liable, on entering with the superior, to pay one year's rent, but is entitled to deduct the year's feu-duty, taxes, and a reasonable allowance for repairs. This payment is what is technically known as the casualty of *composition*. Composition or relief may be fixed by the terms of the charter, in which case the payments due at common law are superseded, and the entry is said to be taxed. The superior formerly was always entitled to have an entered vassal, and might have had the fee forfeited in the event of the vassal's refusing to enter. On the other hand, the vassal was entitled to demand an entry, and on refusal from his immediate superior, might pass him by and enter with a higher. On the subject of this section generally, the following writers may be consulted:—Stair, i. 2. 13, ii. 3; Ersk. ii. 3; Bell's Prin. sec. 676 *et seq.*; Ross' Lec.

ii. p. 23 *et seq.* ; Craig, de Feudis, the Libri feudorum usually annexed to the Corpus juris ; Hallam's Middle Ages, i. p. 200 *et seq.* ; Sir Francis Palgrave's Rise and Progress of the English Commonwealth, and his Histories of Normandy and England ; Thorpe's translation of Lappenberg ; Stephen's Commentaries, etc.

1170. By sec. 23 of the Conveyancing Act, 1874, these casualties—in the sense of being casual—were virtually abolished as regards feus granted after the Act came into force. Henceforth the annual feu-duty must be of fixed amount, and no casualties are payable by law irrespective of express agreement ; and it is not lawful to stipulate for any casualty on the succession of an heir or singular successor, or in any way except at fixed intervals ; but it shall be lawful to stipulate for a permanent increase or reduction of the feu-duty, or for payment of a casualty in the form of a periodical fixed sum, provided the amount of such increase or reduction, or of such periodical payment, and the times from and after which it shall have effect, and at which it shall be exigible, be certain. Further, no fee can now be in non-entry ; for by sec. 4 (sub-secs. 2 and 4) of the same Act any proprietor is to be deemed as entered with the nearest superior in the lands from the date of registration of his infeftment to the same effect as if such superior had granted a writ of confirmation, and whether his own title or that of any over-superior be completed or not. The old action of declarator of non-entry now resolves itself into an action for payment of any casualty exigible at the time, and the implied entry is not pleadable in defence of such action. Secs. 15, 16, and 17 provide for the redemption of casualties in feus granted before the coming in force of the Act ; as to the operation of which, see Morris, 1877, 4 R. 515.

### 3. *Of the Transmission of Heritable Rights.*

1171. *Instruments of Conveyance.* — Charters, dispositions, bonds, and other deeds, by which heritable rights and securities

are constituted and transmitted, whether from the Crown, as their original source, to a subject, or from one subject to another, [were] very extensively modified and very greatly shortened by [a series of] enactments, [beginning in 1845, which were repealed and re-enacted in a single statute by the Titles to Land Consolidation Act of 1868 (31 and 32 Vict. c. 101)].

1172. The leading object of these statutes was to remove certain unnecessary steps between the granting of such deeds by the seller, and the completion of the buyer's title, by the recognition of the transference on the public records.

1173. The old symbolical ceremony of *infestment*, by which the superior, or his representative, gave to the vassal, or his attorney, what was regarded as equivalent to physical possession of the land by the delivery of earth and stone, or of burgage property by other appropriate emblems, had already been abolished by 8 and 9 Vict. c. 35. But though the visit to the lands was dispensed with, the notarial instrument, in which the ceremony of infestment and the subject with reference to which it took place were described, still continued to be indispensable; the deed of conveyance, in place of completing the title to the lands, acting only as a warrant for its completion by infestment, and for the execution and registration of the instrument in question. It was not the conveyance, but the instrument of *sasine*, which entered the record, and thus in reality constituted the most important part of the title to the lands.

1174. The principle of recording the deed by which the right was conferred or transmitted, in place of an instrument in which the fact of its having been so conferred or transmitted was narrated, had already been introduced in regard to heritable securities by 8 and 9 Vict. c. 31. By sec. 1 of that Act it is provided, that "where an heritable security has been constituted by infestment, the right of the creditor therein may be transferred, either in whole or in part, by an assignation or other deed of convey-

ace; and, on such assignation or conveyance being recorded in the general register of sasines, or in the particular register or burgh register of sasines applicable to the lands contained in the security, the said heritable security shall be transferred to the assignee as effectually as if such heritable security had been disposed and assigned, and the disposition and assignation or conveyance had been followed by sasine duly recorded according to the present law and practice."

1175. This principle the recent statutes have extended to all conveyances of land. Their provisions are simply permissive, the old forms being still allowed to be used; and they cannot thus be said to abolish instruments of sasine, but they dispense with the necessity for them in every case, and former experience of similar permissions has proved them to be equivalent to abolition of the old forms.

1176. It is further provided, that conveyances, when presented for registration, shall have a warrant written on them, specifying the person on whose behalf they are presented, and signed by him or his agent. By this arrangement, a conveyance, which may be in favour of several individuals, operates, when registered as an infeftment, only in favour of the party thus indicated. Until the Consolidation Act of 1868 came into force, it was not necessary to put any such warrant on heritable bonds.

1177. Also following the principle already adopted in the Heritable Securities Act, these statutes provide for the contingency of a conveyance containing matter which it is unnecessary and undesirable to record. In such cases an instrument is to be prepared by a notary, setting forth generally the nature of the deed, and containing at length those portions by which the lands are conveyed, and real burdens, conditions, or limitations imposed. A similar course is to be adopted where the deed conveys separate lands or separate interests to the same or different persons.

1178. But it is only in cases of necessity that a notarial

instrument, even of the kind contemplated, is to be resorted to, the object of the Act being, in all cases, to facilitate the recording of the conveyance itself. It is therefore provided that it shall be competent to insert, immediately before the testing clause of any conveyance, a clause of direction, specifying the part or parts of the conveyance which the granter desires to be recorded ; and when such clause is inserted, the keeper of the register shall be guided by it in recording the deed.

1179. Sec. 18 of the Act of 1868 dispenses with another writ, called an instrument of resignation *ad remanentiam*, in the same manner in which the instrument of sasine is dispensed with by sec. 1. Resignation *ad remanentiam* is the ceremony by which a feudal right is permanently restored by the vassal to his superior ; its object being to consolidate both the property and superiority in the hands of the latter. The instrument of resignation was the deed in which a notary set forth the act of resignation, which took place in virtue of a warrant from the resigner to his procurator, called a *procuratory of resignation*. This procuratory was rendered unnecessary by 10 and 11 Vict. c. 48, sec. 3, whereby a clause for resigning to be inserted in the conveyance was substituted. The statute referred to declares, that in future it shall be sufficient for the superior, in whose favour the resignation under the procuratory or conveyance is made, to record the procuratory or conveyance itself, with a warrant of registration thereon ; or, should the circumstances of the case require it, a notarial instrument may be prepared and recorded as in an ordinary conveyance. Now, by sec. 6 of the Act of 1874, a superiority may be consolidated with a mid-superiority, or with property, by the execution by the superior and registration of a minute in the form provided by the Act, to the same effect as consolidation effected by resignation *ad remanentiam*, according to the former practice. But (sec. 7) such consolidation shall in no way affect or extend the rights of any over-superior as to duties or casualties.

1180. As a consequence of dispensing with the instrument of *maine*, it is declared, that it shall be no longer necessary to insert in conveyances a clause of obligation to infeft, or a precept of *maine* or warrant for infeftment. The clause known as the *tenendas*, specifying the manner of holding, or annual duty, or consideration, in virtue of which the lands are held of the superior, may still be inserted, no change having been made by the Acts either on the rights of superiors or the obligations of vassals; but if not so inserted, the conveyance shall be held to imply that the lands are to be holden in the same manner in which the granter of the conveyance held, or might have held, them.

1181. In the usual form of a disposition, a double manner of holding was formerly inserted *a me vel de me*, and under this clause the disponent held the subjects disposed of the seller, till he entered with the seller's superior; but sec. 4 (2) of the Act of 1874 has practically abolished the alternative holding by making the registration of the purchaser's infeftment equivalent to entry with the nearest superior. (*Supra*, 1170.) To the completion of the purchaser's title the former practice required a confirmatory grant of the feu from the superior, but by sec. 4 (1) of the same Act it is enacted that it shall not "be necessary, in order to the completion of the title of any person having a right to the lands in whole or in part, whether such right shall have been acquired by succession, bequest, gift, or conveyance, that he shall obtain from the superior any charter, precept, or other writ by progress: provided always that nothing shall prevent the granting of charters of novodamus, or precepts, or writs from Chancery, or of *clare constat*, or writs of acknowledgment." It has been decided that the heir-at-law of the last entered vassal, base infeft on an *a me vel de me* holding, was not entitled to present himself as vassal in that character, but that the implied entry given by sec. 4 of the above Act extinguished the mid-superiority to the effect of subjecting him to the casualty

due on the entry of a singular successor. (Ferrier's Tra., 1877, 4 R. 738 ; Rossmore's Tra., 1877, 5 R. p. 201 ; [Sivright, 1878, 5 R. 922 ; Lamont, 1879, 6 R. 739, aff. H. L. 7 R. 10.] )

1182. Where there is only a general conveyance of lands, the general disponent may now complete a title by registering a notarial instrument in the form prescribed in section 19 of the Consolidation Act.

1183. The preceding clauses being simply permissive, it is provided, sec. 100, that it shall not be requisite for those who prefer to retain the charter to set forth the *tenendas* and *reddendo*, or feudal conditions on which the lands are held, but shall be sufficient to refer to any other charter or writ recorded in a public register in which they are contained.

1184. The transmission of the feudal right to purchasers being thus provided for, the case of heirs is next dealt with, sec. 101 ; and as it is no longer necessary that the superior should direct the heir to be infeft, what was formerly a precept or command has been changed, in the case of land had on both tenures, into a simple writ or acknowledgment of *clare constat*. In this writ the superior merely declares that "it clearly appears" that the ancestor died last vest in the lands, and that the claimant is his heir.

1185. Provision is made in the relative sections for the appropriate registration of all the deeds thus simplified ; and it is declared that the granting each investiture shall act as a confirmation, by the superior, of the whole deeds and instruments necessary to be confirmed in order to its completion.

1186. Where a party has acquired right to a conveyance before it has been recorded, he is permitted to assign it, and the assignation may be recorded along with the conveyance, or a notarial instrument may be recorded in cases in which that course may be requisite or preferred. By this means the assignee is placed in the same position as if the original conveyance had been granted and recorded in his favour.

1187. The Acts next make various provisions for shortening conveyances, by permitting a reference to be made to former deeds, in place of the repetitions of their provisions which were formerly required in every new transfer. These and subsequent provisions, in which simpler modes of completing titles are introduced in the case of judicial factors, trustees in bankruptcy, and liquidators of joint-stock companies, are of too technical a character to admit of their being explained to the general reader.

1188. By section 107 an extremely simple method of extinguishing mid-superiorities has been substituted for the cumbrous and expensive proceedings which were formerly requisite for that purpose. The superior is empowered to grant a simple deed of relinquishment, and this one deed, having written on it first the acceptance of the vassal, and then the investiture of the over-superior, shall, when recorded in the appropriate register of sasines, be held to extinguish the mid-superiority. This form is still competent, but is virtually superseded by the still simpler form provided by the Act of 1874. (*Supra*, 1179.)

1189. The statute further authorizes the combination of actions of constitution and adjudication against an apparent heir, whether he renounces the succession or not, and declares that the citation, in the combined action, shall have the effect both of a general and a special or general special charge, as circumstances may require (sec. 60). The decree of adjudication thus obtained against the apparent heir, is further declared to be equivalent to a conveyance from the ancestor, sec. 62. By this section also, as formerly mentioned, the privilege of the heir, known as the *annus deliberandi*, is restricted from a year to six months, sec. 61.

#### IV. SALE BY AUCTION.

1190. An auction, or roup, is an arrangement for offering property to the competition of purchasers.

## 272      RELATIONS BETWEEN INDEPENDENT PERSONS.

1191. *The Articles of Roup*, being the conditions under which the seller exposes his property to sale, form an integral part of the contract between the seller and purchaser. This contract is completed by the offer or bidding, on the part of the purchaser, and the acceptance by the seller or his representative, which is formally declared by the fall of the auctioneer or salesman's hammer, the running of a sand-glass, or any other means which may have been specified in the articles of roup. (Mont. Bell, 719.)

1192. The articles of roup usually narrate the nature of the right to be conferred, regulate the manner of bidding, prescribe the order in which offerers are to be preferred, and name a person who shall be empowered to determine disputes between bidders and declare the purchaser, called the judge of the roup.

1193. Before the sale commences, these articles are read over, or otherwise published, to the intending purchasers. They must be executed on stamped paper.

1194. In the sale of heritable subjects, it is usual for the articles of roup to contain a clause of registration, by which the parties consent to a decree going out in terms of the conditions which the article contains, and under which they may be enforced by legal diligence. (Ib. 724.)

1195. A minute of the offers is made generally on the back of the articles, and signed by each offerer.

1196. The implied conditions, which are binding on the seller and purchaser in all auctions, in addition to those expressed in the articles of roup, are—*1st*, That the seller shall not attempt to raise the price by means of fictitious offers, but shall fairly expose the article to the competition of the purchasers; and *2nd*, that the purchasers shall not combine to suppress competition. (Macallan's Erskine, ii. p. 674, note 3; Bell's Prin. 131.)

1197. *An Upset Price*, or price below which the subject is not

to be sold, may be fixed by the exposor, or he may reserve to himself in the articles of roup a power to offer; but unless he does so in express terms, he cannot legally interfere with the sale, either by offering himself or appointing another to do so for him. If there be no express provision to the contrary, it is thus an implied condition that the sale is "without reserve," or "at the pleasure of the company." (*Idem.*)

1198. The conditions embodied in the articles of roup cannot be controlled by any verbal declaration of the auctioneer. (See on this subject More's notes on Stair, lx. lxiv. xci.; Ersk. iii. 1. 2, and Ivory's note; Brown on Sale, 578; Bateman on Auctions; Sugden's Law of Vendors and Purchasers.)

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### CHAPTER III.

#### OF THE RIGHTS AND BURDENS ATTACHING TO HERITABLE PROPERTY.

##### I. PUBLIC BURDENS.

1199. In addition to taxation, local and general, which falls clearly beyond the scope of the present work, there are certain rights which the public possess over the landed property of the country, and which constitute burdens on its proprietors or occupiers. Though properly belonging to the department of public law, of which we do not profess to treat, these burdens are commonly viewed in connection with the rights of individuals, and we shall therefore mention them very briefly.

1200. *Public Roads or Highways.*—The right of highway is a right of property in such a portion of soil as will afford a passage over the property of private individuals, which is vested in the Crown as the representative of the public. (Stair, ii. 7. 0; Ersk. ii. 6. 17; Bell's Prin. 659.)

1201. The distinction between a public and a servitude road will be stated in treating of the latter.

1202. The earlier statutory arrangements placed the public roads of Scotland under the management of the Commissioners of Supply and Justices of the Peace. (1617, c. 8 (1669, c. 16; 1670, c. 9; 1686, c. 8; 11 Geo. III. c. 53).) Subsequently, local Acts were passed, giving power to trustees to apportion the statute labour, or amount of work to be furnished annually by tenants and cottars in the country, and by the inhabitants in burghs, for the repair of highways not turnpike; and to levy tolls and borrow money on the security which these tolls afforded, for the support of such as were turnpike. Great abuses arose out of the manner in which these Acts were obtained and administered, and, as a remedy, the General Road Acts (4 Geo. IV. c. 49; 1 and 2 Will. IV. c. 43) were passed. Notwithstanding the attempt thus made to reduce the management of the highways to an uniform system, the peculiar circumstances of each district have been found to necessitate so many reservations, that local Acts have been passed for almost every county. These Acts are to be read as if the last General Act (1 and 2 Will. IV. c. 43) were incorporated with them. The ruling statute on this subject is now the "Roads and Bridges (Scotland) Act, 1878." (41 and 42 Vict. c. 51.) It enacts that all existing local Acts should continue in force till 1st June 1883 and no longer, at which date its own provisions should come into force, unless before then its own provisions shall have been adopted, or tolls and statute labour abolished in any county. The Act provides for its own adoption in counties and burghs, for the appointment of road trustees, boards and committees, meetings, conduct of business, general management, construction of roads and bridges, finances, assessment, along with special provisions for particular districts, and other details. It does not repeal any previous general Act.

1203. A highway must be at least twenty feet broad, not

including the ditches, and powers are conferred on the trustees to widen all highways to that extent. They are further empowered to widen them where necessary to forty feet, compensation in this case being given for the ground taken beyond the twenty feet.

1204. Jurisdiction under the General Road Act is vested in the Justices of Peace and Quarter Sessions, and the review of the Court of Session is excluded. An excellent digest of the Road Act, and of the decisions connected with highways, will be found in Sheriff Barclay's "Law of Highways," and also in his "Digest of the Law of Scotland for Justices of the Peace." The latter work contains an enumeration of the statutes on the subject from David II. downwards.

1205. *Right of Way*.—The existence or non-existence of a right of way on the part of the public is often a question of extreme difficulty, the solution of which depends on a multitude of circumstances, which render almost every case a new one. A right of way must lead from one public place to another, and must proceed on a definite line. The public cannot prescribe a right of merely roaming over unenclosed ground: a mere *jus spatiandi* is a kind of right unknown to the law of Scotland. (See cases collected in Guthrie's Bell's Prin. 1010, note (e); and the recent case of Mags. of Edinburgh, 1877, 4 R. 997.)

1206. As to jurisdiction, it may be stated, that where what is called a "possessory judgment" is sought on the ground that use and possession of the road for a period beyond seven years can be proved, the Sheriff Court is a competent tribunal; but it is not competent for the Sheriff to decide whether or not there be evidence sufficient to cut the proprietor off from his right to exclude the public on the ground that the prescription of forty years has not run against him. (M'Donald v. Watson, Feb. 23, 1830, and Wilson v. Henderson, March 2, 1855.) This latter question must be tried by declarator before the Court of Session.

1207. *Sea-Shore*.—Closely analogous to the right of highway is the right which the public possess to the sea-shore. The seas and sea-shores of Great Britain are said to be *inter regalia*, i.e. they belong to the Crown for the public use. The shore comprehends all between high and low water-mark; but by the former term is meant only the point which the sea reaches in ordinary spring tides. (Stair, ii. 1. 5; Ersk. ii. 1. 6, and 6. 17; Bell's Prin. 641; Inst. lib. ii. tit. i. sec. 1, 3.)

1208. "There is no substantial distinction between a grant of land as bounded by *the sea*, and as bounded by the *sea-shore*; the shore is given in both cases, subject to public use.

1209. "After a grant so bounded, nothing remains in the Crown but the public trust; and no private person can, by subsequent grant or otherwise, be allowed to interpose between the grantee and the shore." (Bell's Prin. 643, and cases cited.)

1210. Nearly all the sea-shores of Scotland have been granted to private individuals under the burdens and limitations mentioned in these sections.

1211. Where a proprietor possesses lands bounded by the sea-shore, with "parts, pendicles, and pertinents," he has an exclusive right to shell, sand, wreck, seaware, etc., though his titles contain no express grant of the shore. (*Macalister v. Campbell*, Feb. 7, 1837.)

1212. But the salmon-fishings around the sea-coasts of Scotland form part of the hereditary revenues and belong exclusively to the Crown, so far as not *expressly* granted, by charters or otherwise, to subjects or vassals. (*Gammell and Others v. Woods and Forests*, House of Lords, March 28, 1859.)

1213. *Navigable Rivers*.—The banks of navigable rivers are also public, and the same rules apply to them as to the sea-shore. (Ersk. ii. 1. 5; Bell's Prin. 648.)

1214. *The Sea*.—The high sea is the common property of nations; no nation has precedence there; and the jurisdiction

of each is limited to its own subjects, within its own ships. But the rights of the sovereign, as guardian of the people, extend by our law to the seas which wash the coast to the distance, it is said, of a cannon-shot; and to all bays, creeks, arms of the sea, and navigable rivers. These rights include—*1st*, the right to forbid the passage of enemies; *2nd*, the right to levy tolls or duties; *3rd*, jurisdiction, including right of search; *4th*, the right of flag; *5th*, the right of fishing, and taking all wreck and goods found on or under the sea, except such as are claimed and identified. (Stair, ii. 1. 5; Ersk. ii. 1. 6; Bell's Prin. 639 and 640.)

1215. By 6 and 7 Vict. c. 79 to carry into effect a convention between Her Majesty and the King of the French concerning the fisheries in the seas between the British Islands and France, the limits within which the general right of fishing is exclusively reserved to the subjects of the two kingdoms respectively, are fixed at three miles' distance from low-water mark. With respect to bays, the mouths of which do not exceed ten miles in width, the three-mile distance is measured from a straight line drawn from headland to headland. (Declaration in Sched. Art. ii.)

1216. *Ports and Harbours*.—Free ports are also *inter regalia*; and the sole right of erecting public ports and harbours is in the Crown, unless where limited by Royal or Parliamentary grants to communities or subjects. (Stair, ii. 1. 5; Ersk. ii. 6. 17; Bell's Prin. 654.)

1217. The public are entitled to insist that the harbour shall be kept up so far as the means afforded by the dues extend; but the grantee is not bound to improve or repair it out of his own means. (Bell's Prin. 655; Christie, May 16, 1828, 6 S. 1813.)

1218. *Railways*.—These lines of communication, in the eye of the law, stand in a totally different position from the highways which, in so many respects, they have superseded. Though

regulated by public and general statutes (Companies Clauses Consolidation Act, 8 and 9 Vict. c. 17 ; Lands Clauses Consolidation Act, 8 and 9 Vict. c. 19 ; Railways Clauses Consolidation Act, 8 and 9 Vict. c. 33), each railway is the property of a joint-stock company, and as such a private undertaking. For a list of Acts dealing with railways, see appendix to Deas on Railways.

1219. The powers of central control over railways, which in 1846 (9 and 10 Vict. c. 105) were vested in a board of railway commissioners, were in 1851 (14 and 15 Vict. c. 64) restored to the Board of Trade.

1220. All property being held under the condition of being surrendered on a valuation if required for the public service, the proceedings by which a sale of lands is effected, under the sanction of Parliament, for railway purposes, though of more frequent occurrence than others of a similar nature, have nothing peculiar in principle. Liability to compulsory sale by authority of Parliament may thus be included amongst the burdens which attach to all heritable property.

1221. An important statute relating to this subject is the Act to "facilitate the abandonment of railways and the dissolution of railway companies in certain cases." (13 and 14 Vict. c. 83, 1850.)

1222. As to the Act "for the better regulation of the traffic on railways" (17 and 18 Vict. c. 31, 1854), see Carriage.

1223. By 7 and 8 Vict. c. 85, it was enacted that cheap trains shall be provided for the poorer class of passengers, to run the whole length of each railway, each way, daily, under certain regulations, of which the most important are—that they shall be furnished with seats and protected from the weather, and that the fare for each third-class passenger shall not exceed one penny for each mile travelled.

1224. This enactment is explained and modified by the subsequent statute to "amend the law relating to cheap trains, and

to restrain the exercise of certain powers by canal companies being also railway companies" (21 and 22 Vict. c. 75), passed in 1858.

1225. The provisions of this Act as to cheap trains are, that for all fractions of a mile, where the whole distance travelled is less than one mile, one penny may be charged; and for all fractions exceeding half a mile, where the whole distance travelled amounts to one mile or more, one halfpenny may be charged.

1226. No fare heretofore charged to or received from a third-class passenger, shall be deemed to have exceeded the rate prescribed by 7 and 8 Vict. c. 85, "if the same shall not have exceeded the rate of one farthing for each entire quarter of a mile travelled." (Sec. 2.)

## II. SERVITUDES.

1227. As these are not only imposed on, but exist in favour of, private parties, they may here be viewed either as rights or as burdens.

1228. I. PERSONAL SERVITUDES, which are pecuniary burdens on real property constituted in favour of a particular individual, have already been considered under the heads of *Terce* and *Courtesy*.

1229. II. PREDIAL OR REAL SERVITUDES are burdens imposed upon one heritable possession in favour of another. The rights which these burdens imply, pass of necessity to the owners or occupiers of the property in favour of which they have been constituted. (Stair, ii. 7. 5, More's Notes, ccxx.; Ersk. ii. 9. 5; Bell's Prin. 981.)

1230. The property on which the burden is laid is called the *servient tenement*; that in favour of which it is imposed, the *dominant tenement*.

1231. Real servitudes are further divided into those which have reference to lands, and those which have reference to house property in towns. (Stair, ii. 7. 5; Ersk. ii. 9. 6; Bell's Prin. 983.)

1232. 1. *Rural Servitudes*.—Of these the most important are:

1233. (1.) *Road or Passage*.—The right of passage is of three degrees:—1st, foot-road; 2nd, horse-road; and 3rd, cart or carriage road. (Stair, ii. 7. 10; Ersk. ii. 9. 12; Bell's Prin. 1010.)

1234. Whilst highways are open to all the subjects of the realm, the most extensive servitude of road does not extend beyond the dominant proprietor or proprietors. The servient proprietor, moreover, continues to be proprietor of the *solum* or soil over which the servitude exists; and as a consequence of this proprietary right, he is entitled to change the direction of the road, provided the new one be equally convenient for the dominant proprietor. (Ersk. ii. 9. 12; Bell's Prin. 1010; Bruce, June 25, 1748, M. 14525; Ross, Feb. 19, 1751, M. 14531; Magistrates of Renfrew, July 5, 1823.)

1235. There is no obligation on the servient proprietor to maintain the road. (Ersk. ii. 9. 1; Bell's Prin. 1010 and 984.)

1236. (2.) *Pasturage*, by which the proprietor of the dominant tenement is entitled to pasture a certain number of cattle on the grass of the servient tenement. (Stair, ii. 7. 14; Ersk. ii. 9. 14; Bell's Prin. 1013.)

1237. Where the right extends over a common, though it be indefinite as to the number of cattle to be pastured, it is not in reality unlimited, but is regulated as to its extent by the number of cattle which each of the dominant possessions is capable of foddering during the winter. (Ersk. ii. 9. 15; Bell's Prin. 1013; E. of Breadalbane, 1741, 5 B. Sup. 710.)

1238. The action by which the rights of parties having such servitudes, or rights of joint-ownership over a common, are adjusted, is called an action of *souming* and *rooming*. (So spelled by Stair, B. ii. tit. vii. sec. 14.)

1239. (3.) *Feal and Divot* is a right in the proprietor of the minant tenement to cut and remove turf for constructing ceas, covering houses, or the like purposes. (Stair, ii. 7. 13 ; k. ii. 9. 17 ; Bell's Prin. 1014.)

240. (4.) *Fuel* is a right to cut, winnow, and carry away s from the servient moss or peat land, for fuel to the inhabit- of the dominant tenement. (Idem.)

241. These servitudes do not convey a right to provide for hing beyond the ordinary uses of the actual occupants of lominant tenement.

242. 2. *Aqueduct*.—The owner of the dominant tenement, in enjoyment of this right, is bound to maintain the conduits, s, etc., in such a condition as to prevent their injuring the ent lands ; the servient proprietor being bound, on the other , to allow reasonable access for repairs. (Stair, ii. 7. 12 ; . ii. 9. 13 ; Bell's Prin. 1012.)

243. The dominant proprietor is not bound to repair injuries ioned by floods. (Parson of Dundee, 1768, M. 14521 ; ale, 1731, M. 14524 ; Wallace, 1761, M. 14511 ; Weir, 14, 1832, 10 S. 290 ; Thorburn, Dec. 4, 1841, 4 D. 169.)

244. *Watering of Cattle*.—The *aquæ haustus* of the Roman s sufficiently explained by its name. It does not deprive ervient proprietor of the right of watering his own cattle at stream, well, or pond to which it applies. (Stair, ii. 7. 11 ; . ii. 9. 13 ; Bell's Prin. 1011 ; Beveridge, Nov. 18, 1808, .)

245. 3. *Urban Servitudes*.

246. (1.) The servitude of support (*oneris ferendi, et tigni uttendi*) is a right to rest a wall, or a beam, on the neigh- ing building. (Stair, ii. 7. 6 ; Ersk. ii. 9. 7 ; Bell's Prin. ; Murray, 1715, M. 14521 ; Young, Feb. 24, 1831, 9 S. ) A mutual gable is the property of the builder, and though it partly on the adjoining subject, he may prevent the owner at subject from making use of it, until he has paid half the

expense of building it. (*Hunter v. Luke*, June 2, 1846 ; *Law v. Monteith*, Nov. 30, 1855 ; *Earl of Moray v. Aytoun*, Nov. 30, 1858.)

1247. (2.) *Stillicide and Fluminis*.—The first is the servitude of receiving the eavesdrop, the latter the collected water (*flumen*), from a neighbour's house. (*Stair*, ii. 7. 7 ; *Ersk.* ii. 9. 9 ; *Bell's Prin.* 1004 ; *Clark*, 1760, M. 13172 ; *Stirling*, 1752, M. 14526.)

1248. (3.) *Light or Prospect* is a restraint on the absolute use of his property by the servient proprietor, to the effect of preventing him from raising an obstruction to the light or view of the dominant proprietor. (*Stair*, ii. 7. 9 ; *Ersk.* ii. 9. 10 ; *Bell's Prin.* 1005 ; *Ogilvie*, Feb. 5, 1678, M. 14534 ; *Forbes*, July 1, 1724, M. 14505 ; *Glassford*, May 12, 1808, F. C.)

1249. (4.) *Altius non tollendi*, the servitude of not building above a certain height. In this country it is often a servitude *not to build at all* ; and as such it is spoken of by Mr. Bell. (*Stair and Ersk.* idem ; *Bell's Prin.* 1007 ; *Walker*, July 7, 1825, 4 S. 148 ; *Mutrie*, June 26, 1810, F. C. ; *Cockburn*, July 1, 1825, 4 S. and D. 128 ; *Ross*, March 3, 1854, 16 D. 732 ; *Banks and Co.*, 1874, 1 R. 980.)

1250. 4. *Thirlage*.—By this servitude, the proprietors or tenants of lands are bound to carry the grain which their lands produce to be ground at a particular mill, for payment of duties specified in the conveyance, lease, or other deed by which the servitude is constituted. The principal duty is called *multure* ; and the smaller duties, called *sequels*, which fall to the servants of the mill, are known by the significant names of *knaveship*, *bannock*, *lock*, or *gowpen* (such a quantity as may be lifted with both hands). (*Stair*, ii. 7. 15 *et seq.* ; *More's Notes*, ccxxv. ; *Ersk.* ii. 9. 18 *et seq.* ; *Bell's Prin.* 1017 *et seq.*)

1251. 5. *Stipend*, the provision for the support of the clergy of the Church of Scotland, though neither a servitude nor a Crown right, may be here mentioned as being, in country parishes at least, a permanent burden on landed property. It consists

of payments in money or grain, or both, the amount of which varies with the extent of the parish and the state of the free teinds, or other funds set apart for the purpose. Whitsunday and Michaelmas are the terms at which stipend is due. If a minister is admitted before Whitsunday, he is entitled to the whole year's stipend, because his entry is held to have been prior to the sowing of the corn ; and if his interest has ceased before that term, he has no claim on the fruits of the year. If he is admitted after Whitsunday and before Michaelmas, he is entitled to half the stipend, the other half going to his predecessor. The reason why the term for the payment of stipends is Michaelmas, and not Martinmas, is, that they come in the place of tithes, which were due in harvest. Ministers' stipends prescribe in five years.

1252. *Vacant Stipends* were formerly at the disposal of the patron for pious uses, but they have been given by statute to the Ministers' Widows' Fund (the Acts now in force are, 19 Geo. III. c. 20 ; 54 Geo. III. c. lxix.), with the exception of such portions as had formerly (1672, c. 13) been reserved to the representatives of the deceased.

1253. As to these the following is the rule :—If a clergyman die after Whitsunday, his executors have right to the first half of the year's stipend, and his widow and nearest of kin to the other half as "ann." If he survive Michaelmas he has right to the whole of the year's stipend, and his nearest of kin draw the first half of the next year's stipend as ann. (Stair, ii. 8. 34 ; Ersk. ii. 10. 54.)

1254. The annual rates payable to the Ministers' Widows' Fund are declared to be privileged debts, "and preferable to all other debts of the said ministers, etc., not only upon their benefices and salaries respectively, but also upon their whole personal estate." (19 Geo. III. c. 2, sec. 19.)

1255. 6. *The Church*.—The expense of building and repairing the parish church lies on the heritors. (Ersk. ii. 10. 63 ; Bell's

Prin. 1164 ; Kirk-session of Lauder, 1630, M. 7913 ; Boswell, Dec. 9, 1834, 13 S. 148.)

1256. The presbytery may, when necessary, decern for a new church, after appointing a visitation and report by tradesmen, and giving notice from the pulpit. Their decision is subject to review, at the instance of an heritor, or of the minister, by the Sheriff, who is empowered, on finding that a church or manse ought to be built or repaired, and on the heritors refusing or delaying to do so, himself to order the execution thereof. A further appeal lies to the Lord Ordinary in Teinda. (31 and 32 Vict. c. 96.) The heritors are not bound to rebuild if the church be repairable, though too small for an augmented population. (Bell's Prin. 1164 ; M'Neil, Jan. 24, 1828, 6 S. 422 ; Lynedoch, May 14, 1828, 6 S. 791 ; E. of Glasgow, 1834, 7 W. S. 185 ; M'Leod, 1830, 8 S. 475.)

1257. In rebuilding a church, accommodation must be provided for the parishioners, and the rule is to provide for two-thirds of all examinable persons, or persons above ten years of age, in the parish. (Bell's Prin. ib.)

1258. 7. *The Manse*.—The minister has also a claim against the heritors for a manse, whether the parish be wholly landward, or partly town or burgh and partly landward ; but the minister of a parish in a royal burgh is not entitled to a manse, under the Act 1663. If a minister entitled to a manse cannot be provided with one, compensation is given, under 5 Geo. iv. c. 72, sec. 2. (Stair, ii. 3. 40, More's Notes, clxx. ; Ersk. ii. 10. 55 ; Bell's Prin. 1165 ; Auld, June 13, 1827, 2 W. S. 600 ; Blaikie, March 8, 1827, 5 S. 546.)

1259. 8. *The Glebe*.—Every minister of a country parish is entitled to a glebe of four acres of arable land, or sixteen souns of pasturage. He is also entitled to grass for a horse and two cows. (Stair, ii. 3. 40, More's Notes, clxxii. ; Ersk. ii. 10. 59 ; Bell's Prin. 1172 ; Anderson, 1664, M. 5121 ; Fullarton, 1779, M. 5123 ; Mackenzie, July 5, 1825.)

1260. If there are no church lands the glebe is designed out of temporal lands ; the heritor whose lands are designed having recourse against the other heritors. The presbytery possess the power of designing the glebe, subject to review by the Sheriff, with an appeal to the Lord Ordinary in Teinds. (Stair, *idem* ; Ersk. ii. 10. 59 and 60 ; Bell's Prin. 1176 and 1773 ; Kingsbarns, 1794, M. 5140 ; see Laidlaw, Dec. 2, 1800, F. C.)

1261. The incumbent cannot alienate (1572, c. 48), but may feu the glebe, if he can obtain the sanction of the Court of Teinds, on a petition presented with consent of the presbytery and heritors, or he may, with the like consent, let it on lease for any term not exceeding eleven years, reserving five acres nearest the manse. (29 and 30 Vict. c. 71, sec. 1 ; Ersk. ii. 10. 61 ; *infra*, Teind Court.) Upon the transportation of the church to a new locality, the Court have authorized a sale or excambion of the glebe. Excambions of glebes must be sanctioned by the presbytery.

1262. The minerals of a glebe are worked at sight of the heritors and presbytery, and the proceeds are placed under their management for behoof of the incumbent. Trees growing on the glebe are thought to belong to the minister. (Heritors of Keith *v.* Humber, Feb. 16, 1791.)

1263. 9. *Schoolmaster*.—The payment of the salary of the parochial schoolmaster, and the maintenance of the schoolroom and schoolhouse were, prior to 1872, likewise permanent burdens on the heritors of the parish, but this is now regulated by the Education Act. (*Infra*, chap. xiv.)

1264. 10. *Pigeon-Houses*.—In consequence of the destruction caused to the crops of neighbouring proprietors by pigeons, it was enacted by a Scottish statute, which is still in force (1617, c. 19), that no person shall in future be entitled to build a *doucot* (dovecot) upon any lands, either within burgh or in the country, unless he have lands and teinds extending in yearly rent to ten chalders victual, lying within two miles of it, nor to build more

than one within the said bounds. Where lands have been chased with an old dovecot, it is presumed, in the absence of proof to the contrary, to have existed before 1617, and consequently be kept up by a proprietor, though not possessor of the requisite amount of property, though it cannot be proved by him. (*Kinloch v. Wilson*, Jan. 19, 1731.) It has lately been decided that an heritor is entitled to build a pigeon loft for every ten chalders of rental which he possesses. (July 3, 1752, M. 3602.)

1265. Previous to the passing of the statute above referred to, there had been much legislation for the protection of pigeons, and "the taking of them without the permission of the proprietor in general, constitutes an act of theft." (*Irvine, Game Law*, p. 18.) The taking of young pigeons, more particularly, must be so treated. (*Hume*, p. 80.) A tenant will not be entitled to shoot his landlord's pigeons because they are eating his grain, and the landlord refuses to herd them. (May 18, 1832; *Irvine*, p. 19.)

1266. 11. *Game*.—On the subject of the Game Law, the reader is referred to Mr. Irvine's brief but exhaustive treatise [the last edition of which was published in 1883].

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## CHAPTER IV.

### PRESCRIPTION.

1267. A distinction is now very commonly made by legal writers between *Prescription* and what, after the English fashion, we are in the habit of calling *Limitation*;¹ the former

¹ Limitation, except as applied in a different and literal sense to cautionary obligations, is not properly a Scots law term. It is an English phrase, like *lien*; which the works of the late Professor were mainly instrumental in introducing amongst us.

as a total extinction of a right, debt, or obligation by the lapse of time, whilst the latter merely renders certain forms of written acknowledgment incompetent as grounds of action or of summary diligence, without extinguishing the debt, or preventing its existence from being established by other proof. But both, in a general way, may be regarded as modes of extinguishing obligations by the lapse of time; and, in a practical work like the present, the most convenient course will be to treat them together.

1268. Prescription is further divided into *positive* and *negative*, because it is said to be a mode of acquiring property as well as losing it. In the former sense, however, it simply amounts to a mode of securing property by preventing the title of its holder from being called in question after a certain number of years. (Ersk. iii. 7. 1; Bell's Prin. 606; Napier, p. 2.) No original title can ever be created by prescription; the statute by which the so-called positive prescription was introduced (1617, c. 12) expressly declaring that the lands which it secures from challenge after forty years, shall be lands possessed "by virtue of heritable infeftments."

1269. *Forty Years' Prescription*.—What is commonly known as the long negative prescription was introduced into our law so early as the reign of James III. (1469, c. 28, and 1474, c. 54.) By the second of these enactments, the object of which is to explain the first, it is ordained that all old obligations made before, that is, older than, the date of forty years, shall be prescribed, and of no strength; and likewise in time to come, all obligations made, or to be made, that are not followed within forty years, shall prescribe and be of none avail. (Stair, ii. 12. 12; Ersk. iii. 7. 8; Bell's Prin. 607; Napier, p. 34.)

1270. These Acts were at first confined to simple obligations, but were soon extended to mutual contracts of all kinds, including marriage-contracts, and to all cases of debt created by bond. The long negative prescription will even extinguish the right to

challenge the validity of a deed relating to heritable property, provided the challenge be on grounds extrinsic to the terms of the deed. The right of reducing a deed on the ground that it was granted on deathbed, will thus be lost if not exercised within forty years. (Stair, ii. 12. 12; Ersk. iii. 7. 8; Bell's Prin. 608; Napier, p. 37.)

1271. No statute was required to establish a positive prescription in moveables, for the property of moveables is presumed from possession alone, without any written title; and the proprietor neglecting for forty years to claim them, cut off his right of action for their recovery, and thus effectually secured the possessor. (Ersk. iii. 7. 7.)

1272. The long positive prescription was introduced by stat. 1617, c. 12, in order to secure heritage possessed for forty years. It proceeds on the preamble that great inconveniences had arisen from the loss of titles and the dangers of forgery, after the means of improbation are lost by the lapse of time, and the numerous lawsuits which are thus engendered; and enacts, that whatever heritages the lieges have possessed by themselves or others for forty years, continually and together from the date of their infeftments without lawful interruption, shall remain in their peaceable possession, and that they shall not be inquieted in the right of property by their superiors or others pretending right to the same by virtue of prior infeftments. (Stair, ii. 12. 15; Ersk. iii. 7. 3; Bell's Prin. 2002; Napier, 49.) To entitle one to the benefit of this prescription the possession must be attributable to a charter (or disposition) of the lands followed by infeftment; the prescriptive period runs, of course, only from the day of the infeftment. By the Conveyancing Act, 1874, prescription may from 1st Jan. 1879 be pleaded on possession on an *ex facie* valid irredeemable title [(see Hinton, 1883, 10 R. 1110)] recorded in the appropriate register of sasines for *twenty* years. But this does not affect the existing law as to possession required to constitute a servitude or a public right of way or

any other public right. (Sec. 34.) [The meaning of the enactment is that twenty years is now substituted for forty in every case to which the provisions of 1617, c. 12, would have been applicable. (*Buchanan v. Geils*, 1882, 9 R. 1218.)]

1273. If the possession be proved as far back as memory can reach, it will be presumed to have existed from the date of the title on which it is founded. (Ersk. iii. 7. 3; *Borthwick*, June 13, 1677, 2 B. S. 215.)

1274. The long prescriptions, both negative and positive, may be interrupted. This may take place—*1st*, Judicially, that is, by an action raised in Court before the expiry of the forty or twenty years; *2nd*, By a notarial instrument; *3rd*, In the case of the negative prescription, by a new document or acknowledgment of the debt or liability, or by a partial payment to account, or payment of interest, where that can be clearly referred to the debt in question. From the moment of interruption a new course of prescription commences to run. (Stair, ii. 12. 26, and *More's Notes*, cclxvii.; Ersk. iii. 7. 38 and 39; *Bell's Prin.* 615 *et seq.*, and 2007; *Napier*, ii. 656.)

1275. Prescription can be interrupted only by the act of the person against whose claim it is running (Ersk. iii. 7. 41; *Baillie*, March 2, 1790); but it may be *suspended* by his inability to act, in consequence of minority, insanity, or the like. In this case the period of prescription does not recommence as in the case of interruption, but the time during which it is suspended is simply reckoned off. (Stair, ii. 12. 10 and 27; Ersk. iii. 7. 37 and 45; *Bell's Prin.* 625 *et seq.* and 2022 and 2023.) From 1st Jan. 1879, where possession on a title valid as above mentioned shall have continued for *thirty* years, no deduction is to be made for the years of minority and lesion or legal disability. (Sec. 34.)

1276. It is provided by 1669, c. 10, that "all citations which shall be made use of for interruptions, whether in real or personal rights, be renewed every seven years; otherwise to

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prescribe, except the parties be minors." Citations are here opposed to actions, in which the parties have appeared in Court, which continue in force for forty years. (Ersk. iii. 7. 43; Bell's Prin. 618; Napier, 661 and 854; Camerona, 1761, M. 11331.)

### OF THE LESSER PRESCRIPTIONS.

1277. These possess the character which we have described as belonging to those which have recently been termed limitations. Their object is, generally, to protect parties against the effects of their own negligence in preserving vouchers, or their natural obliviousness of small transactions, by transferring the burthen of proof to the claimant who has neglected to recover till after a stated period has elapsed, and by restricting its character. Whilst the long prescriptions extinguish the claim notwithstanding any offer of proof that it is still undischarged, the shorter prescriptions are liable to be elided by the writ or oath of the debtor.

1278. *Vicennial Prescription*.—By 1617, c. 13, the original Act, 1449, c. 57, was so modified as to permit the lawful heir to an heritable estate to bring an action for setting aside an erroneous retour of service at any time within twenty years of its date. The statute 10 and 11 Vict. c. 47, sec. 13, has substituted an extract decree by the Sheriff of Chancery for the former retour, and as nothing special is provided on the subject in the statute, the extract, like the retour, probably falls under the vicennial prescription. (Ersk. iii. 7. 19; Bell's Prin. 2024; Napier, 857.) Services being now no longer necessary (*supra*, sec. 915), it is provided (37 and 38 Vict. c. 94, sec. 13) that the right of any person to an estate in land by succession as heir may be challenged within twenty years of his infeftment as heir, and his entering into possession by any one who would have been entitled to challenge his decree of service had he served in the old form;

in the absence of evidence to the contrary, the date of infeftment is to be assumed to be the date of entering into possession. [The positive prescription of a title to heritage is now vicennial (*supra*, sec. 1272).]

1279. *Holograph Writings*.—By 1669, c. 9, it is provided that holograph missive letters, and holograph bonds, and subscriptions in account books, without witnesses, if not sued for within twenty years, shall prescribe, “except the pursuer offer to prove by the defender’s oath the verity of the said holograph bonds, and letters, and subscriptions.” If the writing is thus proved to be holograph and the subscriptions genuine, the obligation contained in the deed will be effectual unless the debtor can prove that it has been discharged. It is expressly declared that this prescription shall not run against minors. (Stair, ii. 12. 35 ; More’s Notes, p. cclxv. ; Ersk. iii. 7. 26 ; Bell’s Prin. 590 ; Napier, 866.)

1280. Whether the vicennial prescription applies to crimes is open to grave doubt. In one case, where the accused, though within the kingdom, was not brought to trial till after the expiry of thirty years, the Court dismissed the indictment. But circumstances can easily be imagined to explain the delay in such a way as to deprive the accused of any advantage from it. It is quite clear that if the accused had absconded, and the prosecutor had got sentence of fugitation against him, that the crime could not prescribe. It is thought that the question is entirely one of circumstances, and that no strict rule exists. The question is thoroughly discussed by our institutional writers, but most exhaustively by Mackenzie. (Ersk. iv. 4. 109 ; Napier, 869 ; Hume’s Com. vol. ii. p. 136 ; Sir G. Mackenzie, Crim. Law, tit. xix.) (As to Treason, see *infra*, sec. 1298.)

1281. *Decennial Prescription*.—By 1696, c. 9, it is declared that, on the one hand, no action shall be competent to minors against their tutors or curators ; or, on the other, to them against

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the minor, if not prosecuted within ten years after the expiry of the office. (Ersk. iii. 7. 25 ; Bell's Prin. 635 ; Napier, 854.) But in the case of factors, tutors, and curators, under the Pupils Protection Act (12 and 13 Vict. c. 12), it is provided (sec. 34) that if they shall have been discharged by a judgment of the Court, such discharge shall be final against all parties, though pronounced in absence, provided the same shall not be opened up as a decree in absence in the Court of Session, within the time limited for appealing to the House of Lords, or shall not be appealed from within that time.

1282. *Septennial Prescription.* Cautionary Obligations.—The Act 1695, c. 5, on the preamble that "great hurt and prejudice hath befallen many persons and families, and oftentimes their utter ruin and undoing been caused by men's facility to engage cautioners for others," provides that no man so binding himself thereafter, for and with another conjunctly and severally, in a bond or contract for sums of money, shall be bound for the same sums for longer than seven years after the date of the bond. It is further provided, that not only those who are bound expressly as cautioners, but whoever is bound with another as principal or co-principal, shall have the benefit of the Act, if he has either a claim of relief in the bond, or a separate bond of relief intimated to the creditor at receiving the bond. This intimation must be understood as a formal and regular intimation made to the creditor. (Stair, More's Notes, cxv. ; Ersk. iii. 7. 22–24 ; Bell's Prin. 600–604 ; Napier, 850.) "This Act," says Mr Erskine, "being correctory of our former law, hath received the most limited application" (Erskine, Ivory's ed. p. 769) ; as judicial cautioners, cautioners for the faithful discharge of an office, etc., do not fall under it.

1283. *Sexennial Prescription.*—By 12 Geo. III. c. 72, sec. 3 rendered perpetual by 23 Geo. III. c. 18, sec. 55, it is enacted "that no bill of exchange, or inland bill, or promissory note executed after 15th May 1772, shall be of force or effectual t

produce any diligence or action in Scotland, unless such diligence shall be raised and executed, or action commenced thereon, within the space of six years from and after the terms at which the sums in the said bills or notes become exigible." (Ersk. iii. 7. 29, note, Ivory's ed.; Bell's Prin. 594; Napier, 823.) Where, however, the original debt is not itself lost by prescription, the right to recover is not lost by the prescription of the bill; and even a debt falling under the triennial prescription may in such circumstances be sued for. Indeed, the action may proceed for the original debt (though subsequently constituted by bill) prior to the prescription, if the original creditor be still in right of the bill. (Ersk. ib.) Mere verbal admissions of the debt have been held not to constitute interruption of this prescription, and it was observed from the bench that anything done to interrupt it must amount to reconstitution of the debt. (Easton, 1873, 1 Rettie, 23.)

1284. [Markings of interest on the bill in the handwriting of the debtor are sufficient proof, by writ of the debtor, of the debt and its subsistence. But the effect of this is not to raise up the bill again to run a new course of prescription of six years, but to establish the debt as an obligation extinguishable only by the long negative prescription of forty years. (Bell's Prin. 599; Drummond, 1880, 7 R. 452.)]

1285. Bank notes are excepted from the provisions of the statute; and as regards bills and promissory notes, it is provided that, after the expiration of the six years, it shall be lawful to prove the debts which they contain to be resting owing by the writs or oaths of the debtor. (Sec. 39.)

1286. The minority of the creditors must be deducted from the six years. (Sec. 40.)

1287. *Quinquennial Prescription.*—The following prescriptions were introduced by 1669, c. 9:—Arrears of rent from agricultural subjects prescribe in five years from the date of the tenant's removal from the lands; ministers' stipends and

multures prescribe in five years after they become due. (Ersk. iii. 7. 20; More's Notes to Stair, p. cclxxiv.; Bell's Prin. 634; Napier, 818.) Inhibitions now prescribe in five years. (37 and 38 Vict. c. 94, sec. 42.)

1288. All consensual contracts to the constitution of which writing is not necessary, and which may be proved by witnesses, and all bargains concerning moveables, prescribe within five years; that is to say, that after the expiry of that time they can be proved only by the writ or oath of the party. (Ersk. idem; Napier, 813; Hunter, June 29, 1843, 5 D. 1285; Campbell, Jan. 15, 1848, 10 D. 361.)

1289. *The Triennial Prescription*.—One of the most important prescriptions in practice is that which has reference to shop accounts, servants' wages, etc. By 1579, c. 83, it is ordained that "all actions of debt for house-mailles (*i.e.* rents where the lease is verbal), men's ordinaries, servants' fees, merchants' accounts, and other the like debts that are not founded on written obligations, be pursued within three years; otherwise the creditor shall have no action, except he either prove by writ or oath of his party." (Stair, More's Notes, p. cclxiv.; Ersk. iii. 7. 17; Bell's Prin. 629; Napier, 800.)

1290. ["Written obligation" in the sense of the Act requires writing on both sides, or one writing signed by both parties; *e.g.* a claim made on a tradesman's account, more than three years from the date of the last item, where the work has been done on a written offer of the tradesman *verbally* accepted, is not a claim founded on a written obligation. (Chalmers, 1879, 6 R. 199; see also Chisholm, 1883, 10 R. 760.)]

1291. Under "other the like debts," have been held to fall debts due to artificers for their work or wages, and accounts to writers, agents, surgeons, and the like. (Bell's Prin. 629; Napier, 808.) The Act does not apply to cash advances. Where an account consists partly of cash advances and partly of goods furnished, the former are exempted from the prescription.

(M'Laren, 1874, 2 R. 185.) A stockbroker's account for services to the promoters of a railway company has been held to fall under the triennial prescription. (White, 1868, 6 M. 413.) [But it does not apply to a claim by a mandatory against a mandant for outlay. (Grant, 1881, 9 R. 257.)]

1292. The prescription on an account current does not begin to run till the date of the last article in the account. (Ersk. iii. 7. 17; Napier, 766; Bell's Prin. 631; Whyte v. Currie, Dec. 1829, 8 S. 154.) [But the account must not be extended by contrivance to avoid the plea of prescription. (Stewart, 1844, 6 D. 889; Aytoun, 1882, 9 R. 631.)] In house-rents, again, each year's rent runs a separate prescription. (Ersk. do.; Napier, 803; Cumming's Trs. v. Simpson, Feb. 18, 1825, 3 S. and D. 545.) So also in the prescription of servants' wages, each term runs a separate course. (Ersk. *ut sup.*; Bell's Prin. 629.)

1293. Not only the constitution but the subsistence of the debt must be proved, either by the defender's oath, or by a writing under his hand. (Ersk. iii. 7. 18; Napier, 784; 1 Bell's Com. 332; Bell's Prin. 632.) The fact of a partial payment having been made will not give rise to a presumption that the balance is outstanding, unless it has been made expressly as a payment to account. (Dickson on Evidence, p. 288.) "It has been sometimes argued that the words of the statute admitting and requiring proof by the writ or oath of the party, implied the immediate debtor to be still in life. The expression of the statute is 'his party,' which cannot be construed to be simply the party contracting. It would be very unjust so to hold it, for it would exclude the creditor from the benefit of the writ or oath of the debtor's representative, who became by his representation debtor in the debt, and party to the action. 'His party' plainly includes both the immediate debtor and the representative, where the action is brought against the representative, and thus the just construction is

that which the statute in practice has received." (Lord Rutherford, in *Cullen v. Smeal*, July 12, 1853.) "Writ or oath of his party" requires the oath of the actual debtor, and excludes that of, *e.g.*, his business manager. (*Bertram and Co.*, 1874, 2 R. 255.)

1294. [In the case of a wife's debts, the constitution and resting owing of debts incurred by her *before* marriage may both be referred to the husband's oath. But as to those incurred by her *after* marriage, a judicial opinion has been expressed, that, while the constitution may competently be referred to the wife's oath, the resting owing must be referred to the husband's. (*Mitchells*, 1882, 10 R. 378.)]

1295. Numerous cases of the triennial prescription of shop accounts occur every day in the Small Debt Courts; and it is for the judge to say whether the statement made by the defender, which is seldom directly either negative or affirmative, does or does not amount to an admission of resting owing. If his statement be simply that he remembers nothing of the special debt in question, it does not amount to an admission of resting owing, and consequently will not support the claim. If he add that his habit is to settle such debts at the time, the statement will be still more clearly negative; but it does not follow that an admission of a contrary habit will suffice as a proof of resting owing: for the meaning of the rule is, that after the expiry of the three years the tradesman shall not only raise a presumption, but shall positively prove the subsistence of the debt, either out of the mouth or by the handwriting of the defender.

1296. A previous statute of the same year, 1579, c. 81, had applied the same prescription to actions of spoilzie and ejectment; and by c. 82 it is extended to actions of removing, which are ordained to be pursued within three years after the warning, otherwise a new warning must be given.

1297. By 1707, c. 6, actions for wrongous imprisonment

prescribe after three years, computed from the last day of imprisonment.

1298. By 7 Will. III. c. 3, sec. 5, high treason prescribes unless a true bill be found by a grand jury within three years. This statute applies to the three kingdoms.

1299. By 1 and 2 Vict. c. 114, sec. 22, it is provided that arrestments shall prescribe in three years instead of five; and that arrestments which shall be used upon a future or contingent debt, shall prescribe in three years from the time when the debt shall become due.

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## CHAPTER V.

### OF THE CONTRACT OF LETTING AND HIRING.

1300. Location, or letting and hiring, is a contract between the proprietor of a subject or lessor, and the hirer, tenant, or lessee; whereby the former conveys to the latter a right to the temporary possession of the subject, and its fruits and profits, for a certain rent or periodical payment in money, grain, or services. (Stair, i. 15. 1; Ersk. iii. 3. 14; Bell's Prin. 133; 1 Bell's Com. 5th ed. 255.)

1301. The principles applicable to the contract of sale are, in general, applicable also to the contract of letting, which is in reality a sale of the temporary use of a certain subject. (Stair, ib.; Ersk. ib.; Bell's Prin. ib.)

1302. When the subject is land, more especially if it be let for a considerable time, the contract is called a *lease* or *tack*; when it is a house or shop, for the ordinary period of one year, it is commonly called an *agreement*; and when services, an *engagement*. The latter branch of the subject has already been treated of under the head of Master and Servant.

## OF THE AGRICULTURAL LEASE.

1303. [The recent Agricultural Holdings Act, 1883 (46 and 47 Vict. c. 62), whose provisions, so far as coming within the scope of this work, are considered in their appropriate places in the following sections, applies to any holding that is "either wholly agricultural or wholly pastoral, or in part agricultural, and as to the residue pastoral, or in whole or in part cultivated as a market garden, or to any holding let to the tenant during his continuance in any office, appointment, or employment of the landlord" (sec. 35). The landlord may himself be a tenant, and the tenant a sub-tenant (sec. 42). It came into force on 1st January 1884.]

1304. "The writ requisite to constitute a tack," says Lord Stair, "requireth not many solemnities; but if the thing set, the parties, the rent, and the time be clear, the tack will be valid." (Book ii. tit. ix. sec. 5.) Such are still the essentials of all leases.

1305. *Verbal Lease*.—A lease of land cannot be proved by ordinary parole evidence if for more than one year, and a verbal lease entered on for a longer period will not be effectual even for that period. But verbal leases for terms of years have been sustained to the extent of *rei interventus* following on them. A verbal lease, in the absence of *rei interventus*, may be proved by the writ or oath of the party calling it in question. (Stair, ii. 9. 4, and More's Notes, ccxliv.; Ersk. ii. 6. 30; Bell's Prin. 1187 *et seq.*; Hunter, Landlord and Tenant, i. 349; M'Rory, Dec. 1810, F. C.; Gibson, 1875; 3 R. 144.)

1306. *Written Lease*.—A formal lease must be written on stamped paper, and regularly authenticated as a probative deed. (Stair, More's Notes, ccxliv.; Ersk. ii. 6. 24; Bell's Prin. 1190; Hunter, i. 357; M'Niven, March 10, 1836, 14 D. 685; Hutchison, March 4, 1837, 13 D. 837; Forsyth, December 13, 1853, 16 D. 197.)

1307. But where one or even both of these requirements are wanting, it does not follow that the lease may not be rendered effectual; for the stamp may be adhibited at any time on payment of certain penalties, and the want of authentication may be supplied by *rei interventus* or *homologation*. (Stair, More's Notes, ccxlv. (Ivory's ed., note 96), and iii. 3. 47; Bell's Prin. 1192.)

1308. A lease may be in the form of a mere offer, if followed by evidence of acceptance (Bell's Prin. 1190; Cairns, June 18, 1833, 11 S. D. 737; Russel, May 14, 1835, 13 S. D. 752; Burnet, Nov. 27, 1835, 14 S. D. 74); or it may consist of general regulations for the letting and management of an estate, proved to have been accepted by the parties (Bell's Prin. 1190; M'Cra, June 7, 1828, 6 S. D. 935); or it may be simply a written obligation to grant a lease (Garrioch, Feb. 8, 1750, M. 15177; Grant, July 10, 1788, M. 15180).

1309. By a very enlightened enactment, so early as the reign of James II., leases in Scotland were rendered effectual, not only against the granter and his heirs, but against purchasers or other singular successors. "It is ordained," 1449, c. 18, "for the safetie and favour of the puir people that labouris the ground, that they and all utheris that hes taken, or sall take, landes in time to come fra Lordes, and hes termes and yeires thereof; that suppose the Lordes sell or annaly (alienate) that land or landes, the takers (tack-holders) sall remaine with their tackes, unto the ischew of their termes, qhais handes that ever thay landes cum to, for sic like mail as they took them for." This statute, which we have given in full, is interesting when viewed in connection with contemporary legislation on the same subject in other countries, and the high relative position in agriculture which Scotland has now attained.

1310. In order to bring a lease within the provisions of the statute, it must have a definite rent and a definite term. (Stair, ii. 9. 26 and 29; Ersk. ii. 6. 24; Bell's Prin. 1194; Hunter, i.

429; Hamilton, 1626, M. 15188; Oswald, 1688, M. 15194; Redpath, Nov. 22, 1737, M. 15196.)

1311. A lease to endure "whilst grass groweth up and water runneth down," will be effectual against the grantor and his heirs, but not against singular successors. (Ersk. ii. 6. 24; Bell on Leases, i. 44; Bell's Prin. 1194; Kerr and Waugh, 1752, M. 10307; Fraser, 1758, M. 13196; Irvine, 1760, M. 15199.) But such a lease will be effectual against a purchaser also, if he has either been made aware of its nature, and accepted it as part of the bargain, or if he homologates it by his conduct after purchasing the estate (Wight, 1763, M. 15199; Scott, 1771, M. 15200); and leases for any number of years that shall be stipulated are similarly protected, if registered under the provisions of the recent statute, 20 and 21 Vict. c. 26, such registration being prior to the completion of the purchaser's title.

1312. The ancient statute referred to will not cover leases for a period greatly beyond that for which, according to the custom of the country, they are commonly granted, even though the period should be definite. A lease for 400 years is invalid (Allison, Feb. 3, 1730, M. 15196; Jordanhill, Feb. 13, 1752, M. 10307); but an agricultural lease, if granted expressly for purposes of improvement, will be good though it exceed very considerably the customary period of nineteen years. On the same principle, building leases, and, above all, mining leases, will be sustained for periods of any reasonable duration, so long as no attempt is made to create estates in perpetuity by means of lease. This restriction the recent statute, to be presently referred to, has removed, perhaps inadvertently. Liferent leases are effectual. (Bell's Prin. 1195.)

1313. Though the terms of the statute 1449 limit it to lands, it has been held to apply not only to minerals, but to mills, fishings, and the like, on the ground that these are annexed to land—*fundo annexa*. The rule by which objects have been

included under, and excluded from, the statute has hitherto been an extremely arbitrary one. For example, a lease of salmon-fishing is protected, whilst a lease of shooting is not. (Stair, ii. 9. 2; Ersk. ii. 6. 27; Bell's Prin. 1207; Hunter, i. 435; Bell on Leases, i. 31-33; Pollock, June 5, 1828, 6 S. 913.)

1314. The Act 20 and 21 Vict. c. 26 (10th August 1857), "to provide for the registration of long leases and assignation thereof," has introduced what may very readily be converted into a new title to lands in perpetuity. It enacts that it shall be lawful to record in the register of sasines, or, if the lands are held burghage, in the burgh register, probative leases, whether executed before or after the passing of the Act, for a period of thirty-one years, or *for any greater number of years that shall be stipulated*. (Sec. 1.) Leases containing an obligation to renew from time to time, at fixed periods, or on the termination of a life or lives, or otherwise, are declared to be leases under the Act, provided they shall be renewable so as to last for thirty-one years or upwards. Such leases, so recorded, shall be effectual against singular successors in the lands whose infestment is posterior to the date of registration. The Act is merely permissive, and it is provided that all leases which would, under the existing law, have been valid and effectual against singular successors, shall still be valid, though not recorded. (Sec. 2.) Recorded leases may be assigned, and the recording of such assignation shall vest the assignee with the right of the grantor; but such assignation shall be without prejudice to the right of hypothec or other rights of the landlord. (Sec. 3.) Provisions are also made for recording assignations in security, for their translation from one party to another, for the case in which the party presenting for registration is not the original lessee or assignee, etc. (Secs. 4, 5, and 6.) Sec. 16 declares that registration shall, in all cases, be equivalent to possession, to the effect of establishing a preference in favour of the grantee; and

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sec. 17 provides that no lease executed after the date of the Act shall be registerable where the name of the lands and their boundaries are not given, or where they exceed fifty acres in extent.

1315. *Grantor's Title*.—Generally, whoever is capable of contracting may grant a lease. (Stair, ii. 9. 3; Ersk. ii. 6. 21; Bell's Prin. 1180; Hunter, i. 75.)

1316. In the case of heritable subjects, however, it is necessary that the lessor's title should be completed by infestment, or by the forms which the recent statutes have established for infestment and sasine; otherwise the lease, though effectual against the grantor or his heir, and not questionable at the instance of the lessee, may be invalidated by a singular successor duly entered. (Ersk. ii. 6. 21; Bell's Prin. 1181; Hunter, i. 81.)

1317. A lease granted by a husband over his own lands will be effectual against his widow, though it should apply to lands over which her terce extends, or which have been set apart to her by a locality. (Fraser, i. 801; Hunter, ii. 118; Moray v. Stewart, M. 4392.)

1318. Leases of the wife's estate, granted by the husband even without her consent, will be valid during the husband's life. (Bell's Prin. 1594; Grieve, June 18, 1797, M. 5951; Gibson v. Aitken, June 12, 1789; Hume's Decisions, 205; see Hume, 1734, M. 15700.)

1319. A tutor is not entitled, without the authority of the Court, to grant a lease to endure beyond the period of his office. (Stair, ii. 9. 3, and More's Notes, xxxviii.; Ersk. i. 7. 16; Hunter, i. 159; Bell's Prin. 1184, 2084; Ross, March 9, 1820, F. C. M. 14981; Hallows, 1794.)

1320. A lease granted by a minor, with the consent of his curator, is effectual, unless reduced on the ground of lesion. (Stair, i. 6. 44; Ersk. i. 7. 33; Hunter, i. 161; Fraser, P. and C. 336.)

1321. A proprietor who has granted an heritable bond is not thereby deprived of the rights of property, and may consequently grant a valid lease ; but if legal diligence has commenced on the bond, or bankruptcy or sequestration have ensued, leases subsequently granted will be subject to challenge. A voluntary or judicial trust will transfer the power of leasing from the proprietor to the trustees. (Bell's Prin. 1185 ; Hunter, ii. 533 *et seq.*)

1322. The powers of a proprietor are frequently limited by the terms of an entail ; but unless the limitations be express, an heir of entail in possession is in the same position as any other proprietor. (Ersk. iii. 8. 29 ; Bell's Prin. 1752 ; 1 Bell's Com. 68 ; Hunter, i. 83 ; Bell on Leases, 126, note.)

1323. A liferenter can grant a lease only for his own lifetime. In order to secure the tenant of a liferenter in possession for the full agricultural period, the fiar must concur in granting the lease. But the executors of the possessor of an estate in tailzie or in liferent are liable in damages, if the possessor grant a lease beyond his powers, and the lessee be evicted at his death. (Ersk. ii. 9. 57 ; 1 Bell's Com. 62 ; Bell's Prin. 1057 and 1181 ; Hunter, i. 118, and ii. 155 ; Fraser, 1794, M. 8256 and 7849.)

1324. *Powers which the Granter is presumed to reserve.*—Unless there be stipulation to the contrary, the right to the following objects will be held not to be included in an agricultural lease :—

1325. (1.) *Mines and Minerals*, and the power of searching for them, working them, and constructing roads for that purpose on payment of surface damage. (Stair, ii. 9. 31 ; Ersk. ii. 6. 22 ; Bell's Prin. 1226 ; Hunter, ii. 196.)

1326. (2.) *Trees and Wood* ; the tenant having a right merely to the annual fruits of the soil. He is thus entitled to cut young willows as a crop, but not willow-trees. (Ersk. ii. 6. 22 ; Bell's Prin. 1226 ; Hunter, ii. 197 ; Touch, 1664, M. 15252 ; Bogue, 1806, M. Planting Ap. 2.)

1327. The statute 1698, c. 16, "for preserving of planting," has been held to include fruit-trees, but not natural woods,

Logan, 1775, M. 10492.)

1329. (3.) *Kelp*.—The right of cutting sea-ware facturing kelp, formerly of great value, is not covenant even by a lease which gives him “the part and universal pertinents of the farm.” The reverse case, however, were a local custom proved, or to the parties otherwise shown to have been to effect. (Bell’s Prin. 1226; Campbell, June 1, 179 Hunter, ii. 199.)

1330. (4.) *The Right of Hunting and Shooting*.—exercising field sports of every description is held to by the landlord, subject to liability for damage. 1226; Hunter, i. 319, and cases cited; Ronaldson 1804, M. 15270.) [See 40 and 41 Vict. c. 28 as to of rabbits.]

1331. The tenant has no right to kill game without sion from the landlord (Bell’s Prin. 953; Marquis of June 18, 1808, F. C.; Earl of Hopetoun, Jan. 17, Ronaldson, *antea*; Wemyss, Dec. 2, 1847, 10 D. House of Lords, 394); not even under a 999 years’

damage from excessive increase thereof (Cadzow, 1876, 3 R. 666.) Whether the tenant can obtain an interdict against the landlord increasing the game beyond the average quantity when he took the farm is still a question. (See *Wemyss v. Gulland*, Dec 2, 1847.)

1332. The tenant is not entitled to scare the game away by discharging firearms loaded with blank-cartridge, or by hunting them with muzzled dogs. (*Wemyss, supra*, per Lord Justice-General.)

1333. Rabbits are not game; and a tenant is entitled, without consent of his landlord, to kill them for the protection of his crops. (Hunter, ii. 183; Moncreiff, Feb. 13, 1828; [Ingليس, 1871, 10 M. 204.] Rabbits, in relation to a tenant's crops, are "vermin," "and the killing of them does not fall under the Game Licence Act of 1870." (Gosling, 1878, 5 R. 755.])

1334. On the same principle he will be entitled to kill wood-pigeons, probably wild ducks, and all other animals not game; and certainly vermin, foxes included. (Hunter, *ut supra*; Colquhoun, Aug. 6, 1785, M. 4997.) Hares, though game, may now be killed on one's own land without a game certificate. (11 and 12 Vict. c. 30.) [By the Ground Game Act, 1880 (43 and 44 Vict. c. 47), every occupier of land has now, "as incident to and inseparable from his occupation of the land, the right to kill and take hares and rabbits thereon," concurrently with any other person who may be entitled to do so, subject to certain limitations specified in the Act.]

1335. A tenant is not entitled to kill tame pigeons belonging to his landlord, or to any one entitled to keep them in the neighbourhood, but he may scare them away. (Easton, May 18, 1832, 10 S. 542.)

1336. A tenant cannot fish for trout in a river flowing through his farm; and if he do so without permission, he is liable to the penalties of contravening the Act 8 and 9 Vict. c. 26. (*Duke of Richmond v. Dempster*, Feb. 1861.)

1337. *Right of passing over the Farm.*—The landlord is entitled at all times to walk or ride over a farm let for agricultural purposes, provided the tenant's crops are not thereby injured. But the proprietor of a house, with a garden and shrubbery attached, has not, during the occupancy of the tenant, a right of access to the shrubbery in order to prune the plants, dress the ground, and repair the fences. (*Baxter v. Paterson*, May 26, 1843.)

1338. *Destination of the Lease.*—It is commonly settled by the convention of the parties to whom the lease shall go, failing the original tenant. If there be no stipulation on the point, and the lease is given to the tenant simply by name, it will [if he dies intestate] go to his heirs in heritage. (*Bell's Prin.* 1219; *Stair, More's Notes*, ccxlviii.; *Hunter*, i. 210.) If given to two persons, as joint tenants, the interest of one of them dying before the expiry of the lease will go to his heirs, and not to the other tenant. (*Dickson*, July 10, 1825, 2 S. 413; *Macalister*, Feb. 22, 1859, 21 D. 560.) Where the lease is to two and the longest liver, and their heirs, on the death of one, his heir has no right during the lifetime of the other. [The *delectus personæ* as to his tenant, other than the heir in heritage of a deceased tenant, which was formerly the privilege of the landlord, has been invaded by sec. 29 of the Agricultural Holdings Act. By that enactment a tenant may by will bequeath his lease to any person he pleases. The landlord may, however, object to receive the legatee as his tenant, and if he can satisfy the Sheriff, whose decision on the point is final, that he has reasonable grounds of objection, the bequest will not take effect.]

1339. *Transmission of the Lease.*—A power of assigning or subletting is not implied in an ordinary agricultural lease (*Ersk.* ii. 6. 31, 32; 1 *Bell's Com.* 75, 76; *Hunter*, i. 226; *Bell's Prin.* 1216); and, unless under the provisions of 20 and 21 Vict. c. 26, can consequently be exercised only where it is expressly given. But adjudging creditors of the lessee are not excluded unless there be an express clause of exclusion. (*Ersk.* ii. 6. 32; *Bell's Prin.* 1216.)

1340. Where an agricultural lease exceeds nineteen years, or where it is granted for a lifetime, the converse is the rule,—the power of subletting and assigning being implied unless expressly excluded. (Hunter, i. 230.)

1341. Where a sub-lease is given, the original tenant remains bound. (Ersk. ii. 6. 33 and 34 ; Hunter, i. 226 ; Geo. Ronaldson, Pet., Dec. 18, 1812, F. C.)

1342. *Inevitable Damage*.—Where from the effects of inundation, from being overblown with sand, from the devastation of a foreign enemy, or other inevitable accident, the land does not yield a crop sufficient to pay for seed and labour, no rent is payable to the landlord. The landlord, however, is not bound to indemnify the tenant for the seed and labour which he may have expended. Unless the accident can be shown to have arisen from the fault of the one or the other, the landlord loses his rent, and the tenant his seed and labour. (Stair, i. 15. 2 and 3 ; Ersk. ii. 6. 41 ; Bell's Prin. 1208 ; Bell on Leases, 293 ; Hunter, ii. 423.)

#### CONDITIONS OF THE LEASE.

1343. Warrantice on the landlord's part is implied in every lease, to the effect that the tenant shall have undisturbed possession, and shall be protected against all encroachments. (Ersk. ii. 6. 39 ; Bell's Prin. 1253 ; Bell on Leases, 226 ; Hunter, ii. 250.)

1344. On the tenant's part there is an implied obligation to stock the farm adequately, to labour it according to good husbandry, to pay his rent regularly, to keep and leave the houses and enclosures in repair, and to remove at the expiration of the lease. (Ersk. ii. 6. 39 ; Bell's Prin. 1222 ; Bell on Leases, 230 ; Dudgeon, Nov. 23, 1813 ; Thomson, Nov. 12, 1824, 3 S. 275 ; Horn, Jan. 10, 1830, 8 S. 329.)

1345. *Removing Fixtures*.—Articles so attached to land, either by being built upon it or fixed into it, as not to admit of being

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removed without deteriorating the subject itself, and destroying the completeness of the premises from which it is detached, must be left by the tenant without compensation on the expiry of the lease. In the eye of the law, such subjects become heritable by accession, according to the maxim *inædificatum solo, cedit solo*. (Ersk. ii. 6. 39, and note, Ivory's ed. p. 372 ; 1 Bell's Com. 752 ; Bell's Prin. 1255 ; Hunter, i. 284 ; Fisher v. Dickson, March 6, 1843,—House of Lords, June 26, 1845.)

1346. The difficulty is always to determine to what subjects this character belongs ; and it is consequently of importance to note the points that have been established. These in Scotland have been fewer than might be expected, in consequence of the care with which they are usually provided for by positive agreement.

1347. The general rule is, that tenants cannot remove buildings erected for their own use ; but the tenant is not bound to put such houses in repair ; it is sufficient if he leave them in the condition in which he was using them for his own purposes when he quitted the farm. (Ersk. ii. 6. 39, Note 119 ; Hunter, i. 300 ; Thomson, Feb. 8, 1822, 1 S. 340.)

1348. Where a tenant has erected a thrashing mill he will be entitled to remove the machinery, but not the building. If he has received a sum of money for the purpose of erecting such a mill, however, the machinery will be held to be included. (Ersk. ii. 2. 4, Note 20, Ivory's ed. ; Bell's Com. 752 ; Hyslop, Jan. 11, 1811 ; Campbell, Feb. 22, 1825.)

1349. Trevises, racks, and mangers, put up in a cottage temporarily used as a stable, may be removed by the tenant without paying damages to the landlord. But the Court thought "if the trevises had been permanent fixtures, the case might have been different." (Scott, Dec. 1, 1824, 3 S. 344.) A sheep-farmer has been held entitled to remove wire fencing and wooden palings put up by him at his own expense and for his own convenience (Duke of Buccleuch, 1871, 9 M. 1014) ;

and a nursery-gardener to take away greenhouses, hot-bed frames, and the like. (Syme, 1861, 24 D. 202.)

1350. The subject has been much more frequently discussed in England ; and as the laws of the two countries do not differ essentially on this point, it may be desirable to mention a few of the leading points which have been ruled.

1351. A beast-house, carpenter's shop, fuel-house, cart-house, pump-house, and fold-yard wall built of brick and mortar, tiled, and let into the ground, erected at the tenant's own expense, could not be removed even during the term of the lease, and though the premises were thereby left in a state in which he entered them. (Elwes v. Maw, 3 East. R. 38 ; Hunter, i. 291 ; Woodfall, 325 and 330.) A tenant put a barn upon pattens and blocks of timber, *lying* on the ground ; and on proof that it was customary to do so in the particular part of the country, in order to carry them away, a verdict was given for the lessee. (Culling v. Tuffnal, at Hereford, 1694, Rule Nisi Prius, 34.) It is said that the same result would now follow without any proof of local custom ; the tendency of the later decisions having been to relax the former law of fixtures in favour of the tenant. A windmill of wood had a brick foundation ; but the wood was not let into the brick, but pressed on it with its weight merely : it was found that the mill might be removed ; and a similar decision was arrived at with reference to a barn similarly constructed. (Rex v. Otley, 1 Barn. and Adol. 161.)

1352. There are *dicta* in England, to the effect that gardeners may remove hothouses and other erections for horticultural purposes ; and it is decided that nurserymen may remove trees and plants. But if a private person, or one who occupies land as a farmer, raises young trees for the purpose of planting his orchard, he is not entitled to sell or remove them at the end of his term. So a tenant, not a gardener, cannot remove a border of box planted by himself, unless by special agreement with the landlord. (Hunter, i. 293.)

1353. *Fences* erected by the tenant cannot be removed, but the tenant is not bound to leave them in repair. (Hunter, vol. ii. p. 207 ; Bell's Prin. sec. 1254.) But see Duke of Buccleuch, *supra*, sec. 1349.

1354. The simple rule in all such cases would seem to be that the tenant should be permitted to remove his fixtures, on condition that he either restored the ground to its original condition, or paid damages occasioned by his failing to do so ; and that the landlord, if he thought proper, should be entitled to insist on their removal, and to claim either that the ground be left uninjured or that damages be paid him for the injury.

1355. [By the Agricultural Holdings Act, a tenant is now entitled, before or within a reasonable time after the termination of his tenancy, to remove fixtures (comprehending any engine, machinery, or fencing) affixed to, or buildings erected by himself on, his holding, after the first of January 1884, except where (1) he is, under the Act or otherwise, entitled to compensation for them ; or (2) they were affixed or erected in pursuance of an obligation to do so, or instead of some others belonging to the landlord. But this only on the following conditions, namely—(1) That the tenant has paid all his rent, and satisfied all other obligations to the landlord ; (2) that he does no avoidable damage to the holding by the removal ; (3) that immediately thereafter he makes good whatever damage he may have caused ; (4) that he has given a month's written notice to the landlord of his intention to remove ; (5) that before the expiration of the notice the landlord has not elected to purchase the fixtures or buildings himself, which he may do for what would be their fair value to an incoming tenant. (45 and 46 Vict. c. 62, sec. 30.)

1356. [One effect of this enactment will probably be, that whereas formerly, when the fixtures belonged to the landlord, the Court was inclined to put a strict construction on the term

fixtures, the tendency of judicial decision, now that they have been transferred to the tenant, will be to interpret the term less narrowly. The illustrations, therefore, given in the foregoing sections, being applicable to the old state of the law, will probably suffer modification under the new law. (Johnstone, Agricultural Holdings Act, p. 54.)]

1357. *Mode of Cropping*.—It is not unusual to prescribe a mode of cropping more specific than that which is implied in the condition, that it shall be conform to the rules of good husbandry, and to fix a sum which shall be payable as additional rent if the management shall be altered. But the most approved course is to prohibit an injurious rotation, or to prescribe one simply for the termination of the lease, leaving the choice during the rest of it to the judgment of the tenant. (Forms of the agricultural lease as used in East Lothian and Berwickshire, containing the rotation clauses above referred to, will be found in the Juridical Styles, vol. i. pp. 689, 694.)

1358. *Removing*.—After the stipulated period has expired, the tenant is entitled to remain in possession, on the ground of tacit relocation, till legally removed by the landlord; but tacit relocation will not effect a renewal of the lease for the original period of duration, but only from year to year. In order to warrant judicial removing, the tenant must be formally warned by the landlord to remove; and the only effect of an express stipulation to remove in the lease seems to be to obviate the necessity for warning. The subject of removing was regulated by the statute 1555, c. 39, the complicated machinery of which was simplified, first, by an Act of Sederunt, 1756, and latterly by the Sheriff Court Act, 16 and 17 Vict. c. 80, sec. 29.

1359. By the Act of Sederunt it was requisite that the action of removing should be called in the Sheriff Court forty days before the Whitsunday at which the lease expired; or, if it expired at a different term, forty days before the Whitsunday

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previous to that term. The action thus called was equivalent to warning under the statute; and the Sheriff having given decree in it, followed by a decree of ejection, the physical removal of the tenant might be effected *vi et armis*. "But it was found inconvenient that such notice should be brought forty days before Whitsunday, when perhaps the term of removal was Martinmas; and in order to remedy that inconvenience, the Act of Parliament was passed which placed the matter on a more reasonable footing, which gave the party notice by summons of removing forty days before the term at which he was actually to remove. That is now the law." (Lord President, in *Granger v. Geils*, July 16, 1857.) [But see *infra*, sec. 1367.]

1360. By subsequent clauses of the Sheriff Court Act, it is provided,—*1st*, That a lease containing an obligation to remove shall be equivalent to a decree of removing; and such lease, or an extract thereof, along with a written authority signed by the landlord, or his factor or agent, shall be a sufficient authority to a sheriff-officer or messenger-at-arms to eject, provided forty days' notice has been previously given; and, *2nd*, That a letter of removal granted by the tenant, either holograph or attested by one witness, shall be equivalent to a decree of removing, and shall likewise be a warrant to an officer to eject, provided forty days' notice have been given.

1361. [*Notice of Termination of Tenancy* must now be given in writing, in the case of leases for three years and upwards, not less than one year or more than two years, and in the case of leases from year to year, or for less than three years, not less than six months, before the stipulated termination of the lease; and failing such notice, tacit relocation will operate a renewal of the tenancy for a year. The notice must be in the form prescribed in the Act. But the provision does not affect the right to remove a tenant who has been sequestrated in bankruptcy. (45 and 46 Vict. c. 62, sec. 28.)]

• 1362. *Landlord's Hypothec.*—This is a security which the landlord possesses, *ex lege*, over the crop of each year for the rent of that year, and over the cattle and stocking of the farm for the current year's rent. (Ersk. ii. 6. 56 ; Bell's Prin. 1236 ; Hunter, ii. 345.)

1363. (1.) *Crop.*—Each crop, so long as it exists and belongs to the tenant, is hypothecated to the landlord for the rent of the year of which it is the crop ; and this claim continues though the landlord should not exercise his right for years. "Hypothec," says Lord Ivory (Notes on Erskine, p. 387), "is not competent for the current rent over the produce of *another* year ;" and he quotes from Mr. Bell : "The produce of the farm is hypothecated for the rent of the year whereof it is the crop, and for *none else* ; the right remaining to the landlord as long as the crop is extant." (Bell's Com. ii. 37, ed. 1826.)

1364. This right of the landlord formerly took precedence of all claims on the part of the creditors of the tenant, and the landlord was even entitled to vindicate the corn grown on the farm from a purchaser, unless sold in bulk in public market. (Ersk. ii. 6. 58 ; Bell's Prin. 1242 ; Hunter, ii. 368 and 376 ; Hay, March 29, 1639 ; M. 6219.) But now, by the "Hypothec Amendment (Scotland) Act, 1867," sec. 3, where agricultural produce shall have been purchased *bona fide* at its fair marketable value, the price paid, and delivery and actual removal from the farm has taken place, or, where the sale shall have been at public auction by the tenant, after seven days' written notice of the intention so to sell shall have been given to the landlord, or his factor or agent, and sequestration shall not have been applied for, then in either case the right of hypothec shall cease and determine ; but the provision is not to have the effect of authorizing the removal from the farm of agricultural produce which legally or according to the terms of the lease could not have been removed prior to the passing of the Act.

1365. (2.) *Cattle and Stocking.*—There is no such right of

vindication against the purchasers of stock, which differs also from the crop in this respect, that it is hypothecated only for the rent of the current year. Three months are allowed to the landlord for rendering his right effectual, after the last conventional term of payment. Where the cattle have been carried off by a pouncing creditor, the landlord must thus bring his action against him within three months. (Ersk. ii. 6. 61; Bell's Prin. 1241; Hunter, ii. 365.) The right of hypothec is now lost by the statute mentioned in the preceding section, sec. 4, unless proceedings by sequestration are commenced within three months after the term of payment, legal or conventional; but this provision is not to apply to any lease or bargain current at the date of the passing of the Act.

1366. [This security is now limited to leases which were current at 11th Nov. 1881, for by the Hypothec Abolition Act of 1880 (43 Vict. c. 12) "the landlord's right of hypothec for the rent of land, including the rent of any building thereon, exceeding two acres in extent, let for agriculture or pasture," is abolished from that date.

1367. [*Removal for Non-payment of Rent.*—In compensation to the landlord for the loss of the security of hypothec, the remedy of removing a tenant who is in arrear of his rent has been made more stringent. Sec. 27 of the Agricultural Holdings Act has repealed secs. 2 and 3 of the Hypothec Abolition Act, and altered the remedies there provided. Where the landlord's right of hypothec has ceased he has now the remedy, where the tenant is six months in arrear, of an action of removing at the next term, before the Sheriff, and if the rent due be not then paid, or caution found for it, and for one year's rent more, the Sheriff may decern the tenant to remove as if his lease were determined, and he had been legally warned to remove. A tenant so removed has the rights of an outgoing tenant whose lease expired at the term of his removal. Secs. 1 and 2 of the Hypothec Abolition Act (which authorized

[removal between terms) are repealed, and sec. 5 of the Act of Sederunt of 1756 is declared inapplicable to any case where the provision of the Agricultural Holdings Act would apply, that is to say, to any lease granted after 11th Nov. 1881. With regard to leases granted previous to that date, the remedies of secs. 4 and 5 of A. S. 1756, namely, under sec. 4, of declarator of irritancy of the lease, where the tenant is two years in arrear; and under sec. 5, where he is one year in arrear, of an action against him to find caution for the arrears, and for five crops more, or for summary removal, are left in force. Sec. 4 is not declared inapplicable to tenancies where hypothec has ceased, but it is of course superseded by the earlier remedy at six months. (See Johnstone, p. 18.)

1368. [*Compensation for Improvements.*—The most important change made by the Agricultural Holdings Act on the law of landlord and tenant is in regard to improvements made by the tenant on his holding during his tenancy. While formerly, in the absence of express agreement, all improvements made by a tenant went to the benefit of the landlord without any claim on the tenant's part for compensation, the result of this Act is to shift the benefit from the former to the latter; but the claim for compensation is to the tenant only on his *quitting the tenancy*, not at the end of his lease, should he elect to renew it and stay on; only the "waygoing" tenant has a claim; the "sitting" tenant has none.

1369. [The Act divides improvements into three classes which are scheduled in the Act:<sup>1</sup>—(1) Those which cannot be

<sup>1</sup>[PART I.

IMPROVEMENTS TO WHICH CONSENT OF LANDLORD IS REQUIRED.

- (1.) Erection or enlargement of building.
- (2.) Formation of silos.
- (3.) Laying down of permanent pasture.
- (4.) Making of water meadows or works of irrigation.

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[made by the tenant without the landlord's consent; (2) those to which the landlord's consent is not required, but in respect of which notice must be given by the tenant; (3) those which may be made without either notice or consent.

1370. [A tenant who has made any of these improvements has a general right, on "quitting his holding at the termination of his tenancy," to compensation therefor, representing the value of the improvement to an incoming tenant. In estimating the value of the improvement, account is to be taken of what is justly due to the "inherent capabilities of the soil." (Sec. 1.)

1371. [For improvements executed *before* the commencement of the Act (1st Jan. 1884), compensation is payable (1) where an improvement of the third class, which the tenant was not under an express obligation to make, and for which he already

- (5.) Making of gardens.
- (6.) Making or improving of roads or bridges.
- (7.) Making or improving of watercourses, ponds, wells, or reservoirs, or of works for supply of water for agricultural or domestic purposes.
- (8.) Making of permanent fences.
- (9.) Reclamation of waste land.
- (10.) Weiring or embanking of land and sluices against floods.

### PART II.

#### IMPROVEMENT IN RESPECT OF WHICH NOTICE TO LANDLORD IS REQUIRED.

- (11.) Drainage.

### PART III.

#### IMPROVEMENTS TO WHICH CONSENT OF LANDLORD IS NOT REQUIRED.

- (12.) Boning of land with undissolved bones.
- (13.) Claying of land or spreading blaes upon land.
- (14.) Liming of land.
- (15.) Marling of land.
- (16.) Application to land of purchased artificial or other purchased manure.
- (17.) Consumption on the holding by cattle, sheep, or pigs of cake or other feeding stuff not produced on the holding.]

[is not entitled by contract or custom to compensation, has been made by him within ten years before the commencement of the Act; (2) where an improvement of the first or second class, for which the tenant was not by contract or custom entitled to compensation, and to which the landlord has given written consent within a year from the commencement of the Act, has been made by him. (Sec. 2.)

1372. [For improvements of the first class, *i.e.* structural improvements, executed *after* the commencement of the Act, compensation is payable only if the landlord have previously given his consent in writing thereto, either unconditionally or according to agreement, and if the latter, then the agreed on compensation is to be substituted for the compensation under the Act. (Sec. 3.)

1373. [For improvements of the second class, *i.e.* drainage, executed *after* the commencement of the Act, compensation is payable only if the tenant have, not more than three, or less than two months before beginning their execution, given written notice of his intention to make them. The landlord and tenant may then agree as to the manner of execution and compensation; or the landlord may execute them himself and charge the tenant with an annual payment, recoverable as rent, for twenty-five years, till the outlay is repaid. In default of any agreement, or of the landlord's undertaking the improvements, the tenant may proceed to do so and claim compensation under the Act. Stipulations in current leases as to outlay in drainage are saved, and no more compensation than the stipulated amount can be claimed in respect of these. The landlord and tenant may agree to dispense with the notice. (Sec. 4.)

1374. [Agreements and customs under current leases providing specific compensation for any of the improvements scheduled, though executed *after* the commencement of the Act, are reserved from its operation. Also where, in tenancies beginning *after* the commencement of the Act, "fair and reasonable" compen-

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[sation for any improvement of the third class executed thereafter, is provided by agreement, the compensation is to be paid in pursuance of the agreement and not under the Act. The last provision applies to a current lease when no specific compensation for an improvement of the third class is provided by written agreement or custom. (Sec. 5.)

1375. [*Reductions and Deductions.*—In ascertaining the amount of compensation certain reductions are to be taken into account, namely, (a) any benefit which the landlord had allowed to the tenant in consideration of his executing the improvement; (b) the value of any manure that would have been produced by consumption on the farm of the last two years' crops of the tenancy, where these have been sold off by the tenant, unless he has made a proper return of manure to the farm in place of the produce sold off.

1376. [The compensation suffers deduction of any sums payable to the landlord for (1) rent; (2) taxes, rates, or public burdens, or interest, drainage charges, premiums of insurance payable in respect of the holding for which the tenant is liable as between him and the landlord; (3) breach of contract by the tenant within four years of the end of the tenancy; (4) deterioration by the tenant within the same time. (Sec. 6.)

1377. [The tenant loses his claim to compensation unless he gives notice in writing of his intention to make it four months before the termination of his tenancy. (Sec. 7.)

1378. [The Act prescribes in considerable detail the procedure to be followed in fixing the amount of compensation. It is by reference in the first instance with an appeal, on certain specified grounds, to the Sheriff, where the amount awarded exceeds £100, and his decision is final. (Secs. 9 to 20.)

1379. [Section 36 provides: "Any contract or agreement made by a tenant by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement specified in the schedule hereto (except an agree-

[ment providing such compensation as is by this Act permitted to be substituted for compensation under this Act) shall, so far as it deprives him of such right, be void." Being in restraint of contract this clause will fall to be strictly construed, and it is thought that it is within the power of a landlord practically to get rid of its effect by stipulating, when granting a lease, that none of the improvements under classes 2 and 3 shall be made by the tenant without his consent, thus placing these improvements in the same position as those of the first class. To none of the other provisions of the Act, but those relating to compensation for improvements, is a compulsory clause attached.]

1380. A tenant is not entitled to retain his rents, pending the lease, for illiquid claims of damages against his landlord for alleged violations of the stipulations of the lease. (Hunter, ii. 264; *M'Rae v. M'Pherson*, Dec. 19, 1843.)

#### RENTING OF HOUSES, SHOPS, AND OTHER SUBJECTS.

1381. The principles which regulate agricultural contracts of location are applicable, with a few exceptions, to the letting of urban subjects and manufactories.

1382. If, along with the house or shop, the use of furniture or machinery be let, the articles of which it consists are usually given over by inventory.

1383. Written leases of urban tenements are effectual against singular successors under the statute 1449, cap. 18. (Ersk. ii. 6. 27; Bell's Prin. 1273; Hunter, i. 436; Bell on Leases, i. 34; Weddel, 1794, M. 10309; MacArthur, 1804, M. 15181.)

1384. In an urban tenement the tenant is entitled to sublet and assign, unless specially prohibited; the reverse being the rule with reference to agricultural subjects. (Bell's Prin. 1217, 1274; Hunter, ii. 252; Anderson, July 10, 1811, F. C.)

1385. A house let along with shootings, tolls, or other sub-

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jects, which do not fall under the statute, is nevertheless protected. (Hunter, i. 437.)

1386. *Repairs*.—The landlord is bound to deliver the house in a habitable condition, and to maintain it so during the currency of the term or lease. (Ersk. ii. 6. 43; Bell's Prin. 1253; Hunter, ii. 211.)

1387. The tenant is not entitled to compensation for money expended in ornamenting the house, or even in adding to its conveniency. (Hunter, ii. 211.)

1388. The tenant may claim the expense of repairs which he has made without the landlord's consent, provided they be necessary. (Ib., and Ersk. *ut supra*; Hamilton, 1667, M. 10121; Deans, 1681, M. 10122.)

1389. If the landlord refuse to indemnify the tenant, the latter, if within a royal burgh, may apply to the Dean of Guild, whose warrant, proceeding on the estimate of tradesmen, is legal evidence both of the necessity and expense of the repairs effected. (Ib.)

1390. The landlord is entitled, on cause shown, to enter the house for the purpose of inspecting its condition and effecting needful repairs. (Hunter, ii. 183.)

1391. The tenant must repair injuries occasioned by his own fault or negligence (Hunter, ii. 212; Hardie, March 3, 1768, M. 10133; McClelland, 1797, M. 10134); but if they arose from an inevitable or extraordinary cause, the burden falls on the landlord, even though by the lease or agreement the tenant is allowed a sum for preservation from decay and destruction from the ordinary effects of weather. (York Buildings Co., M. 10127; Hunter, ii. 212.)

1392. It is usual to make repairs and meliorations the subject of express agreement; and where a clause to this effect has been inserted in the lease, it will be binding on the heir, and, failing him, on the executors of the landlord, or on his singular successor. (Hunter, ii. 214 and 225.)

1393. *Vermin*.—A tenant may throw up the lease if the house has become uninhabitable from vermin; and if the nuisance is one which will not be easily cured, he is not bound to wait till an attempt to do away with it has been made. (*Kippen v. Oppenheim*, Dec. 13, 1847.)

1394. *Removing*.—Neither the statute nor the Act of Sederunt above referred to (*ante*, p. 311) apply to removings from burghal tenements, and formal warnings are consequently unnecessary.

1395. Timeous warning alone is requisite; and any intimation to quit, however informal, if acknowledged to have been received by the tenant *forty days* before the expiry of the lease or term of occupancy, will be sufficient even in burghs where the ancient form of chalking the door is observed. (*Ersk. ii. 6. 47*; *Bell's Prin. 1278*; *Hunter, ii. 79*; *Riddel, Nov. 21, 1671, M. 13828*; *Bartoun, June 24, 1709, M. 13832*.)

1396. In like manner, it is sufficient if the tenant give up his house forty days preceding Whitsunday, provided there be no lease or stipulation to the contrary, and this even in burghs in which Whitsunday is not the usual term for letting houses. (*Hunter, ii. 82*; *Jack, 1795, M. 13866*.)

1397. [The Removal Terms (Burghs) Act, 1881 (44 and 45 Vict. c. 39), fixes the terms of removal within burghs, which were formerly irregular, to the twenty-eighth of May for Whitsunday, and the twenty-eighth of November for Martinmas. In the case of houses let for less than four months, the warning must be as long as a third of the lease. The warning may be given by registered letter posted in time to be delivered at the latest date on which the warning may be lawfully given. The Act applies to all royal and parliamentary burghs, and to "any populous place" whose boundaries have been fixed under the General Police Act (25 and 26 Vict. c. 101).]

1398. *Country Houses*.—Formal warning is not necessary in country houses, unless there be land attached to them. (*Hunter, ii. 54 and 83*; *Lunden, Dec. 19, 1758, M. 13845*.)

1399. It was held not to be necessary in the case of two small houses, to which a garden of less than a quarter of an acre was attached, and which were held on a verbal lease for £5. (Ersk. ii. 6. 47 (Ivory's note); *Chirnside v. Park*, March 8, 1843.) But unless the land be very insignificant, it will be advisable to give the regular warning prescribed by 16 and 17 Vict. c. 80.

1400. *Landlord's Hypothec* extends, in houses and shops, over the goods and furniture; and as an agricultural tenant comes under an implied obligation to stock the farm, so an urban tenant is bound to furnish the premises which he occupies, and is liable to be removed if he fail to do so to the extent of affording security for the rent. "The hypothec, in urban tenements (like that over farm stocking), continues for three months after the term, within which period the landlord is entitled even 'to follow the property into the possession of another landlord, and there sequestrate the *invecta et illata* that had formerly been in the sequestrating parties' house.'" (Ivory's Erskine, p. 392, note 151; Bell's Prin. sec. 1275; Hunter, ii. 353.)

1401. This right extends not only to furniture, but to books, paintings, plates, jewels, perhaps wines; but not to money, documents of debt, or wearing apparel. (Ersk. ii. 6. 64; 2 Bell's Com. 30 and 31; Bell's Prin. 1276; Countess of Callander, June 13, 1703, M. 6244.)

1402. The effects of travellers in an inn, or lodgers in a lodging-house, are not liable. (Ersk. ii. 6. 64 (note 151); Bell's Com. 31; Bell's Prin. 1276.)

1403. Furniture hired for permanent use is subject to the hypothec. (Ersk. idem; 2 Bell's Com. 30, note 6, and 31, note 2; Hunter, ii. 355; Bell's Prin. 1276; Pearson, June 6, 1820, F. C.; Wilson, Dec. 17, 1813, F. C.)

1404. In shops and warehouses the hypothec extends over the goods for sale; but as the tenant, for the purposes of his trade, must have an unlimited power of sale, the hypothec will not affect the right acquired by a *bona fide* purchaser. (Ersk.

ii. 6. 64; Bell's Com. 31; Bell's Prin. 1276-7; Hunter, ii. 358.)

1405. *Bankruptcy of the Lessor or Lessee.*—Where the lessor becomes bankrupt, unless his creditors fulfil the contract by putting the lessee in possession of the subject let, his estate will be subject to a claim of damages; but the lessee will not be entitled to decline to take possession if offered to him by the creditors. (Hunter, ii. 541.)

1406. The creditors of the lessee, on the other hand, may insist on proceeding with the contract, in which case the bankrupt's estate will be liable for the full hire, and not merely for a dividend. Even if the creditors should wish to abandon the contract, the lessor will be entitled to rank for the rent or hire for the whole term agreed on as the amount of his damage, deducting such sum as he may have actually received for the subject. (Hunter, ii. 559.)

#### LETTING AND HIRING OF SHIPS.

1407. The use of a ship may be let, either in whole or in part, either on *charter-party* or *general freight*.

1408. By the former, the use of the whole or a certain portion of a ship, by ton-weight or barrel-bulk, is let for a certain period, for a certain purpose; by the latter, the owners simply come under an engagement to carry goods, in terms of an advertisement or agreement. Both contracts are included in the general term *Affreightment*. (Ersk. iii. 3. 17; Bell's Prin. 405; 1 Bell's Com. 538.)

1409. Affreightment by general ship is a pure contract of carriage, and as such is left to legal construction, except in so far as regulated by the ship's advertisement and the bill of lading. The advertisement is a public offer to receive and carry goods, and proceeds usually from the master or ship's husband as acting for the owner, and tacitly binding him. How far expressions in the

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advertisement not repeated in the bill of lading, such as promise to sail with convoy, amount to a special undertaking constituting a warranty, seems still unsettled. The bill of lading completes the contract, expressly enumerating the heads of it, and fixing the possession of the goods on the master of the vessel and the liability for them on the owner. (M'Laren's Bell's Com. i. 589 ; Abbot, 11th ed. p. 277 *et seq.*)

1410. Contracts by charter-party admit a distinction between two kinds. Either the charterer may contract for the use of the vessel and the services of the master and crew, the possession of the former remaining in, and the latter continuing to be the servants of, the owner ; or the agreement may carry the possession of the ship to the charterer, and put the master and crew in the position of servants to him, pending the contract. In the former case the contract is one for the carriage of goods constituted by special written agreement, viz. the charter-party ; in the latter it is one of lease of a ship in which the charterer becomes possessor, as he would of a house rented by him. In the latter case also there arises a contract of service between the charterer and the master and crew of the vessel which does not emerge in the former case, they holding possession for the charterer, and ceasing to do so for the owner, who has temporarily demitted possession.

1411. The determination which of the two contracts exists in particular cases—frequently a matter of no little difficulty—is a question of intention of the parties, and has important bearings on other rights and obligations. When the owner is still in possession of the ship by his servant the master, the possession of goods sold, on board, is possession by him as carrier on behalf of the buyer, and such goods are in a state of *transitus*, and still liable to stoppage at the instance of the seller or a creditor. But where the master is the immediate servant of the buyer, as hirer of the vessel, he is merely the hand of the buyer, and delivery to him is delivery to the buyer, and the *transitus* is at an end. The determination of the nature of the contract has a similar

effect on the shipowner's lien on the goods carried for freight. In the former case he has a right to retain the goods till freight is paid by the shipper; in the latter case such a right, as depending on possession by the owner, obviously cannot exist unless by special agreement. It also determines the question of liability as principal for non-delivery of goods by the master, and may affect that for necessities supplied to the ship. The prior kind of contract is that most usually met with in practice, and in doubtful cases will be presumed by the Court, unless the other appear clearly from the terms of the contract. (M'Laren's Bell's Com. i. 232, note 1, and 587, note 4; Abbot, 11th ed. 240 *et seq.*; Maclachlan on Shipping, 2d ed. 322 *et seq.*)

1412. The whole space agreed for by the freighter must be paid for, whether it is filled by his goods or not. (Bell's Com. 539; Bell's Prin. 409; Pothier, Charte Partie, No. 22, vol. ii. p. 377.) If the whole ship be freighted, the master cannot fill up space which the freighter may leave unoccupied without his consent. (M'Laren's Bell's Com. i. 587.)

1413. Such an agreement does not require to be in writing; but a regular charter-party, being always a written agreement, must be stamped. It may then contain a clause of registration for summary diligence. (Ersk. iii. 3. 17; Bell's Prin. 406; 1 Bell's Com. 539; 55 Geo. iii. c. 78; 5 and 6 Vict. c. 79, sec. 21.) A contract to take goods on general freight may be proved by parole evidence. (M'Laren's Bell's Com. i. 589.)

1414. Both contracts imply, as conditions on the part of the owners and master;

1415. (1.) That the vessel shall be seaworthy and fitted for the particular voyage, having the hull sound, and furnished with all necessary tackle and apparel, and provided with a proper master and crew. (Bell's Prin. 408; 1 Bell's Com. 540; Abbot, 282 *et seq.*; Story's ed. 222; 1 Emerigon, 373; Pothier's Charte Partie, No. 30.) Here the hiring of ships differs from an ordinary contract of letting and hiring, in respect that it

1416. (2.) That she shall be at the port on the appointed day, and remain there for a such time specially stipulated. (Bell's Principles and Bell's Com. i. 588.)

1417. (3.) That she shall sail at the appointed weather permitting, but on no account in ten days. (Idem; 1 Valin, 691; Abbot, 291.)

1418. (4.) That she shall be properly managed. (Bell's Principles and Bell's Com., ib.; Abbot, 299; 2 Keble, 100.)

1419. (5.) That the goods shall be taken and delivered as directed, and in the same condition. (Bell's Principles and Com., idem; Abbot, p. 309; Leith Shipping Co., May 31, 1829, 2 Muir, 100; Jan. 23, 1825, 3 S. 464; Bishop, Feb. 18, 1825, 3 S. 464; Rae, Feb. 7, 1832, 10 S. 303; Urquhart, May 18, 1832, 10 S. 567.) The master is justified in delivering the goods to the holder of a bill of lading and should there be more than one such, he is not liable to any of the other holders on delivery, the master not being expected to determine who is the true holder.

1421. (2.) To pay the freight at the time specified, or, if no time be specified, at the end of the voyage. (Bell's Prin. 420 *et seq.*)

1422. (3.) To indemnify the owner for detention of the ship (if any) beyond a certain time.

1423. The time for loading and unloading is usually regulated by express stipulation in the charter-party. This is in the form of a special contract that a certain number of days, called lay-days, shall be allowed, with the addition of a further time, called demurrage, for which, in the case of loading, the freighter, in that of unloading, the person in right of the bill of lading, may still detain the ship on certain terms. Where a fixed number of days is stipulated there is an absolute obligation on the charterer not to exceed them, and should he do so the owners are entitled to indemnification both on the express contract and on the ordinary principles of damages, which will in general be measured by the amount of the sum fixed for demurrage. Where, however, nothing is said about lay-days or demurrage, or where reference is made to the usual time, the time allowed will be regulated by what is customary in the port, or in the trade, or what is reasonable. All risks of delay from overcrowding of docks, ice, or other impediments during the loading or unloading, are run by the freighter; but as they are completed all such risks shift to the owner. (M'Laren's Bell's Com. i. 621 *et seq.*; Abbot, 11th ed. 264 *et seq.*; MacLachlan, 487 *et seq.*) [Lay-days are computed by days or parts of days, not by hours. (Hough, 1879, 6 R. 961.)]

1424. It is no answer to a claim for demurrage against a person unduly detaining a ship in unloading that he did not get notice of her arrival, for it is his duty to watch for her, or that he did not receive the bill of lading in time, the master refusing to give up the goods till it was produced, he being entitled to do so for his own protection; but if the delay were caused by the

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owner, as by refusing to allow the ship to be unloaded, or by neglect or inability, even though unavoidable, to obtain clearances for sailing, then the loss will fall upon him. (Abbot, 11th ed. 272 ; MacLachlan, 2nd ed. 489.)

1425. Freight is stipulated either (1) at a gross sum for the voyage ; or (2) rateably at so much per ton of the ship's burden, or per cask or bale actually shipped ; or (3) on time. In the last case the duration of the voyage is at the risk of the merchant, in the other two at that of the owner. Freight includes also primage and petty average. The former, sometimes also called "hat-money," is a small payment in the form of gratuity to the master on the safe delivery of the goods. The latter denotes several petty charges for towing, beaconage, etc., apportioned between the ship and the cargo. Both are sometimes computed for a specific sum or a percentage on the freight. The obligation for payment of freight is usually laid, in the bill of lading, on the party to whom the goods are deliverable, "he or they paying freight," and is made a condition of their delivery. The person, however, primarily liable for freight is the shipper, and such a clause in the bill of lading is introduced only for the benefit of the master. It enables him to enforce payment from the consignee, or to retain the goods, but imposes no obligation on him to do so, and if he deliver without demanding his freight recourse still remains against the shipper. (M'Laren's Bell's Com. 614 ; MacLachlan, 465.)

1426. Freight is due in general only on completion of the voyage and delivery of the goods at the destined port in the like condition as shipped, but to this rule there are exceptions. If, though the ship be lost or disabled, the goods are delivered undamaged at their destination, or the merchant takes them as they are, full freight is due. When goods have arrived damaged, freight is due without abatement where the harm has resulted from any fault inherent in the goods, or of the shipper, and not from fault on the part of the owner, or from the unsea-

worthiness of the ship. It is further settled that the consignee may not pick and choose among the goods, but must take all or none. But where goods, by being so entered in the bill of lading, become bound to be delivered in specific form (in the case quoted, bags of grain)—and the *onus* lies on the master to prove this impossible—the consignee is entitled, where there is short delivery, not only to refuse payment of freight on those short delivered, but also to set off the value of the missing goods against the balance of freight due without raising a cross action. (Shankland, 1865, 3 Macph. 810.) Whether when goods have suffered damage from accident or irresistible force they may be abandoned for freight is as yet unsettled by judicial decision, but would seem to be contrary to the spirit of our law, as throwing a risk on the owner beyond that arising from the fault of his servants or the insufficiency of his ship. (Bell's Prin. 424; M'Laren's Bell's Com. i. 617; Abbot, 11th ed. 379 *et seq.*; MacLachlan, 2nd ed. 434 *et seq.*)

1427. Though, as a general rule, freight is payable in full or not at all, there are circumstances in which part payment is demandable. This occurs either (1) where the voyage being completed only a portion of the goods are delivered, or (2) where the whole goods are delivered, but short of the port of destination. In the first case the freight will be due for what is delivered if rateably stipulated, the contract being here divisible in its nature. In the case of an incomplete voyage freight will be due, as it is called, *pro rata itineris peracti*, provided the goods have been accepted by the merchant, where the obstruction has been caused by hostile force or stress of weather. But if the master still offer to carry the goods to the end of the voyage, and is prevented by the merchant, he will be entitled to full freight. Freight *pro rata* is also due where the voyage is distinctly divisible into parts, as into an outward and a homeward trip. Freight *pro rata* proceeds on the principle that the

original contract has been departed from and a new one entered into founded by the merchant's acceptance of the goods. (Bell's Prin. 425-427; M'Laren's Bell's Com. ib.; Abbot, 11th ed. 385 *et seq.*; Maclachlan, 2nd ed. 433 *et seq.*)

1428. *Lien for Freight*.—Where the contract is merely one for the carriage of goods, and not of the hiring of a ship as explained above, the carrier by water, equally with the carrier by land, has a right of detention over the goods till he is paid for their carriage. The ground of this right is possession of the goods, and it ceases on the loss of possession. Delivery and payment of freight are concurrent acts, and if delivery be made without payment the lien is gone. The lien, as against the consignee, covers the whole goods comprised in his bill of lading for the freight of the whole. It entitles the master to withhold delivery of the goods till the freight is paid, but not to keep them on board ship. The practice usually is to land them in the master's name, and deposit them with a wharfinger or in a bonded warehouse, to be kept there till the freight be paid. The lien is preserved by giving notice to the wharf or warehouse owner, who renders himself liable to the shipowner if he give them up till it is discharged. The lien is discharged by production of a receipt to the wharf or warehouse owner for the amount due, or by depositing the amount in his hands. (25 and 26 Vict. c. 63, secs. 68, 69; Bell's Prin. 1422 *et seq.*; M'Laren's Bell's Com. ii. 94 *et seq.*; Abbot, 11th ed. 237 *et seq.*; Maclachlan, 2nd ed. 475 *et seq.*) The lien at common law only extends to the freight for the goods carried. There is no right of retention for a general balance; nor for money payable in advance in name of freight, which is not properly freight; nor for dead freight, demurrage, port charges, or wharfage; but it may be created for any of these by special contract. (Bell, *sup.*; Maclachlan, 2nd ed. 475 and 478.)

1429. *Bill of Lading*.—This, which is the shipmaster's receipt to the merchant for the goods put on board the ship,

has, as formerly explained, become a very important negotiable instrument. In addition to being a receipt for the goods, the bill of lading is an obligation to deliver them at the port of destination to the shipper himself, or his order, or his assignees, or the bearer, or an assignee or purchaser expressly named, or his assignees. (1 Bell's Com. 542; Bell's Prin. 414; Abbot, 266.)

1430. Bills of lading are used both in general freight and along with a charter-party. In the former case it is usually the only evidence of the contract; but in the latter it is only supplementary, its function being to fix the goods as described in it on the shipmaster. It may, however, vary the details in the charter-party with regard to the mode in which the contract of carriage is to be performed, although the substance of the contract is still to be looked for in the charter-party. (Davidson, 1878, 5 R. 706.) The obligation to deliver may be to a person named or left in blank. A bill of lading must be on a stamp, and cannot be stamped after execution; and a penalty of £50 is incurred by making or executing a bill of lading not duly stamped. (33 and 34 Vict. c. 97, sec. 56.)

1431. Bills of lading, like foreign bills of exchange, are generally drawn in sets of three, "one of which bills being accomplished, the other two are to stand void." One of these bills is usually sent by post, one accompanies the cargo, and one remains with the shipper. (Bell's Prin. 417; Bell's Com. 543.)

1432. A bill of lading transfers to the consignee named in it, and to every indorsee to whom the property of the goods may pass (possession of the bill being *prima facie* evidence of property), all rights and liabilities in respect of the goods, as if the contract in the bill of lading had been made with himself, but without prejudice to any right of stoppage *in transitu*, or any right or claim to freight against the original shipper or owner, or any liability of the consignee or indorsee as such, or

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by his receipt of the goods. A bill of lading in the hands of a consignee or onerous indorsee is evidence of shipment of the goods against the master or other person signing, but not against the owner (*Meyer v. Dresser*, 16 C. B. N. S. 646, 33 L. J. C. P. 289), though the goods have not been actually shipped, unless the holder had notice when he received the bill that they had not been put on board, the master having power to exonerate himself by showing it was no fault of his, or that it was caused by the shipper or holder, or of some one under whom the latter claims. (18 and 19 Vict. c. 111.)

1433. The general rule is, that shipowners, in common with other carriers, are liable for all accidents to goods under their charge not caused "by the act of God and the king's enemies." But fire is expressly excepted by statute (17 and 18 Vict. c. 104, sec. 503); and so is fault or insufficiency of a qualified pilot where the taking of a pilot is compulsory (*ib.* sec. 388), provided the shipowners prove that the fault was entirely his and not in any way contributed to by the master or crew. (*Clyde Nav. Trs.* 1875, 2 R. 842; *aff.* 1876, 3 R., H. L. 44.) The bill of lading usually extends the exception to "all and every other dangers and accidents of the seas, rivers, and navigations, of what nature and kind soever." (*Bell's Com.* 543; *Abbot*, 266; *Bell's Prin.* 414.)

1434. There is no obligation for gold, silver, watches, or jewels stolen, unless they be entered as such in the bill of lading, or their nature and value specially intimated in writing. (*Bell's Prin.* 436; *Bell's Com.* 562; 17 and 18 Vict. c. 104, sec. 503.)

1435. Shipowners are not liable beyond the value of the ship and freight for embezzlement by their servants, or for negligence occasioning injury to the cargo. (7 Geo. II. c. 15; 26 Geo. III. c. 80, sec. 1; 53 Geo. III. c. 159.) The owners of any ship, whether British or foreign, are not liable in respect of loss of life or personal injury, either alone or together with loss or damage

to ships, boats, goods, merchandise, or other things, on board their own ship or another, to an aggregate amount exceeding £15 for each ton of the ship's tonnage, nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate not exceeding £8 for each ton of the ship's tonnage. (25 and 26 Vict. c. 63, sec. 54 ; Miller, July 20, 1875, 2 R. 976.)

## SHIPMASTERS, INNKEEPERS, AND STABLERS.

1436. The special responsibilities mentioned at the conclusion of the last section are not peculiar to those who let ships, and undertake the transport of goods by sea. Though considerably modified both by statute and decisions, the general rule of the law of Scotland, adopted from a well-known edict of the Roman Prætor (the edict is in these words : " Nautæ, caupones, stabularii, quod cujusque saluum fore receperint, nisi restituent, in eos judicium dabo."—Dig. lib. iv. tit. 9), still is that all persons who hold themselves out as public servants, willing to receive travellers and their goods for hire, whether for purposes of transport or of temporary custody and entertainment, are liable for the goods and effects committed to their care ; that they are answerable for the acts of their servants, and even of other guests and passengers. The claimant was allowed, in the absence of other evidence, to prove the value of the lost article by his oath *in litem*. This oath, like the oath in supplement in cases of filiation, would probably be held superseded by the new law of evidence, by which parties are made admissible witnesses in their own cause. This point, however, has not yet been authoritatively decided. (Stair, i. 13. 3 ; Ersk. iii. 1. 28 ; Bell's Prin. 235 ; 1 Bell's Com. 466.)

1437. There is no liability on this ground for money taken from the pockets of the traveller ; but if the money has been taken from the pockets of clothes which have been stolen, or

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from trunks that have been broken into, the innkeeper or carrier is liable. (Ersk. iii. 1. 28; Browster, June 5, 1707, Dict. 9240; M'Pherson, May 26, 1841, 3 D. 930.)

1438. There is no liability for articles of unusual value or fragility, unless an increased charge has been paid expressly as insurance in consequence of the nature of the subject (11 Geo. iv. and 1 Will. iv. c. 68; 17 and 18 Vict. c. 31); and the value of such articles must be proved by ordinary legal evidence. By the Railway and Canal Traffic Act of 1854 it is provided that the company shall be liable for neglect or default in the carriage of goods, animals, etc., notwithstanding any notice or condition or declaration made by the company for the purpose of limiting their liability; but that the company shall not be liable beyond a limited amount, unless the value be declared and extra payment made. The proof of value is laid on the person claiming compensation.

1439. The innkeeper will be relieved from responsibility if the guest undertakes the exclusive charge of his goods; but it will not be presumed that he has done so though he may have adopted some peculiar arrangements for their safety. (Stair, i. 13. 3; 1 Bell's Com. 469; Bell's Prin. 236. See Gordon, Jan. 19, 1700, M. 9237; Hay, June 24, 1704, M. 9238; Farnworth v. Packwood, 1 Starkie, 249; M'Pherson, *sup.*)

1440. By the Act 26 and 27 Vict. c. 42, important alterations are made on the laws relating to the liabilities of innkeepers. It is provided (sec. 1) that "no innkeeper shall, after the passing of this Act, be liable to make good to any guest of such innkeeper any loss of or injury to goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than a sum of £30, except in the following cases:—

"(1.) Where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ.

"(2.) Where such goods or property shall have been deposited expressly for safe custody with such innkeeper."

1441. The Act also provides that the innkeeper may insist on the property being properly secured in a sealed box; and the exemptions shall not be available if the innkeeper should refuse to receive goods for safe custody, and if he fail to exhibit at least one copy of the first section of the Act in the principal entrance to his inn.

1442. An innkeeper has a right to detain the horse or wearing apparel of a guest who refuses to pay his bill, even though the ground on which payment is refused is that the charges are excessive. (2 Bell's Com. 104; Bell's Prin. 1428; *Johnson v. Hill*, 3 Starkie, 172; *Naylor v. Mangles*, 1 Esp. 109; *York v. Greenhaugh*, 2 Lord Raymond, 866.)

1443. An innkeeper, besides his ordinary lien at common law, has now the right, in payment of his bill, "absolutely to sell and dispose by public auction of any goods, chattels, carriages, horses, wares, or merchandise," left in any part of his premises after they have remained in his custody for six weeks, and after having advertised the intended sale, with a short description of the goods, one month before in one London and one local paper. But the debt in satisfaction of which such sale is made must be no other or greater debt than the goods could have been retained for under the ordinary lien; and the surplus, after satisfying the debt with expenses of sale, must be repaid on demand to the owner of the goods. (41 and 42 Vict. c. 38.)

1444. A railway company was found liable for luggage which, though not addressed, was delivered to a porter of the company by a passenger, who informed him of its destination, and who himself took a ticket for the same place; and this, although the passenger did not inquire for his luggage on a change of carriages, which took place in the course of the journey. In this case the value of the effects was ascertained by the oath of the passenger. It was observed on the bench, that the company

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might have refused to take the luggage without an address ; but having taken it, they were answerable for its safe delivery. (*Campbell v. Caledonian Ry.*, May 27, 1852.)

1445. The rule which applies to carriers has been held to include carters and porters, who offer themselves for hire to carry goods from one part of a city to another. (*Bell's Com.* 467 ; *Bell's Prin.* 236 ; *Ewing*, July 1687, *M.* 9235 ; *Manners*, Dec. 2, 1769, *M.* 9245 ; 2 *Kent*, 598.)

1446. Hackney coachmen, however, have been said not to fall under it, as not being employed in the carriage of goods, nor in such journeys as to render luggage the necessary accompaniment of a passenger. From the extent to which such persons are now employed in the transport of luggage, the justice and expediency of this view seem extremely doubtful. (1 *Bell's Com.* 468 ; *Bell's Prin.* 236 ; *Upshore v. Aidee*, *Com. Rep.* 25 ; 1 *Selwyn*, *N. P.* 323 ; *Jeremy's Law of Carriers*, 13.)

1447. Wharfingers and warehousemen are exempted from the rule, and are liable only under the contract, or in accordance with mercantile usage. (1 *Bell's Com.* 467 ; *Bell's Prin.* 236 ; *Ross v. Johnston*, 5 *Bru.* 2825 ; *Sideways v. Todd*, 2 *Starkie*, 400 ; *Garside v. Trent Nav. Co.*, 4 *Term. Rep.* 581 ; *Webb and Others*, 8 *Taunt.* 443.) In England the principles of the edict have been commonly referred to the custom of the realm, and are more or less embodied in the Carriers' Acts.

1448. The question as to whether lodging-house keepers are included is still undecided in Scotland. In England the negative view has been adopted, on the ground that they do not profess to entertain and lodge all travellers ; and the same has been held with reference to coffee-house keepers not professing to lodge guests, and owners of public-houses merely for the sale of beer, etc. (See *Cayle's case*, in *Smith's Leading Cases* ; *Roscoe's Digest of the Law of Evidence at Nisi Prius*, 9th edition, p. 415.)

1449. The Mercantile Law Amendment Act of 1856 (19 and

20 Vict. c. 60) provides that all carriers for hire of goods within Scotland, shall be liable to make good to the owner of such goods all losses arising from "accidental fire," while such goods were in the custody or possession of such carriers. (Sec. 17.) Though the words of the statute are general, it is probable that here, as in England, where the same rule prevails, an exception would be made in the case of fire occasioned by lightning, which is the act of God. (Chitty and Temple's Law of Carriers, p. 41.)

1450. Carriers, innkeepers, and others thus responsible are bound to restore the thing lost in the same state in which it was received, and will be liable to make good any injury to the article. To this the only exception is inevitable accident. Neither theft nor robbery are inevitable accidents, nor fraud or negligence of servants. (Bell's Prin. 237 *et seq.*)

1451. [When goods are delivered by a carrier at the proper time and place, the consignee should at once examine them and intimate any objection he may have to their condition. If he objects only after an interval, the presumption is that they were delivered in good order, and the burden of proving the reverse will lie on him. (Stewart, 1878, 5 R. 426.)]

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## CHAPTER VI.

### OF PLEDGE AND LIEN.

1452. *Pledge* is a contract by which one man advances a sum of money to another on the faith of a special moveable subject, of which the former obtains the temporary possession, but which he binds himself to redeliver on repayment of the money. It is further of the essence of this contract, that if the money be not repaid within a reasonable period, which is usually fixed

by stipulation, the holder of the subject, or pledge, shall be entitled to bring it to sale. (Stair, i. 13. 11 ; Ersk. iii. 1. 33 ; 1 Bell's Com. 258, 2 Bell's Com. 20 ; Bell's Prin. 203 and 1363.) The sale can take place only in virtue of a warrant from the Judge Ordinary.

1453. *Lien* differs from *pledge* in this, that in *lien* the property of the debtor is already in the hands of the creditor, who retains it in security for his debt. (Stair, i. 18. 7 ; Ersk. iii. 4. 20 ; 2 Bell's Com. 91 ; Bell's Prin. 1410.) The principal objects over which the right of *lien* rests are : A ship for repairs ; goods conveyed by a carrier or shipowner for dues or freight ; luggage, horses, or carriages of a traveller, for the price of entertainment at an inn ; and cattle pastured in a field, for the value of the grass. Law agents have also a *lien* over the title-deed of their clients for payment of their accounts, and bankers over bills of their customers not discounted. (*Mein v. Boyle and Co.*, January 17, 1828.)

1454. As regards *lien* for remuneration for labour, an important distinction is to be noted between the case in which the contract of service has reference to a particular piece of work (*locatio operis*), and that in which it has reference to work in general (*locatio operarum*). In the former case, as when one hires a tradesman to perform a certain operation on an object which is delivered to him, the tradesman is entitled to retain the object till he be paid for his work. A watchmaker may retain a watch given him to clean till he be paid for cleaning it, because it came lawfully into his possession, and lawful possession is the foundation of the right of retention. In the latter case, of which domestic service may be taken as the most prominent example, the servant has no right to retain any portion of his master's property in security of his wages, the property never having been in his lawful possession at all. (*Fraser, M. and S.* 152 ; *Burns v. Bruce, Hume*, p. 29.)

1455. The nature of *hypothec* has been already illustrated.

(*Ante*, p. 307.) It differs from both pledge and lien in this, that the subject of it remains in the hands of the debtor. (Stair, i. 13. 14; Ersk. iii. 1. 34; 2 Bell's Com. 25; Bell's Prin. 1385.)

1456. The chief occasions in which pledge is resorted to are —(1) Temporary pressure for money on the part of a merchant possessed of goods, of which, from the accidental state of the market, he is unable or unwilling to dispose; and (2) Extreme poverty.

1457. Its employment in the former case usually takes place under the Warehousing, in the latter under the Pawnbroking Acts.

1458. In addition to the benefits which result to trade from its ordinary employment under the former enactments, it has sometimes been employed by Government in extraordinary circumstances with the most remarkable advantage. Of this Mr. Bell has given an interesting example in his Commentaries, vol. ii. p. 21. "In 1793," he says, "in consequence of many concurring causes of despondency which marked that eventful period, there was throughout Great Britain a general distrust. A number of country banks stopped payment; discounts were entirely at an end; the Bank of England refused to go further in supporting the mercantile classes; and many eminent manufacturers suspended their works, and were utterly unable to resume them, or afford employment to their labourers. At this crisis Government interfered. Parliament authorized (33 Geo. III. c. 29) five millions to be lent on Exchequer bills on the deposit of goods; and in a very short time credit was restored as by a miracle. Not more, perhaps, than one-fifth of the whole sum was ever called for. The mere knowledge of the relief restored confidence; and the commissioners on the Act reported, that 'the advantages of this measure were evinced by a speedy restoration of confidence in mercantile transactions; and that the whole sums advanced on loans were paid, a considerable

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part before it was due, and the remainder gradually at the stated periods, without apparent difficulty or distress.'” It is very important that the results of so successful an experiment in finance should not be forgotten.

1459. The principal Acts relating to the warehousing of goods under bond are—3 and 4 Will. iv. c. 57; 16 and 17 Vict. c. 107; 18 and 19 Vict. c. 96; 20 and 21 Vict. c. 62; 22 and 23 Vict. c. 37; 23 and 24 Vict. c. 36; 23 and 24 Vict. c. 110; 25 and 26 Vict. c. 63; 26 and 27 Vict. c. 7; 26 and 27 Vict. c. 102; 27 and 28 Vict. c. 12; 28 and 29 Vict. c. 96; and 32 and 33 Vict. c. 103.

1460. It is provided that the Commissioners of the Treasury shall fix upon certain warehousing ports, and shall there appoint warehouses in which goods may be kept, without payment of any duty on their entry, upon bond granted for the ultimate payment of the full dues of importation, or, where the goods are prohibited to be imported for home use, for their due exportation. (3 and 4 Will. iv. c. 57, secs. 2, 8; 16 and 17 Vict. c. 107, secs. 10, 11.)

1461. Such bonds may be granted, either by the keeper or proprietor of the warehouse, in a general shape, and for the purpose of covering all the goods deposited with him, or by the different importers of the separate quantities of goods. (Sec. 8.)

1462. The goods must be carried to the warehouse under authority of an officer of Customs on pain of forfeiture. (3 and 4 Will. iv. sec. 13.)

1463. All goods so warehoused must be cleared, either for exportation or home use, within five years; and if not so cleared, they shall, after one month's notice to the warehouse-keeper, be sold, and the produce applied to payment of duties, warehouse rent, and other charges,—the overplus (if any) being paid to the proprietor. (16 and 17 Vict. c. 107, secs. 103, 104.)

1464. Consignment of goods sent from a distance in security

or satisfaction of debt, is another mode in which the contract of pledge is in frequent use by merchants in one country who have creditors in another.

1465. *Pawnbroking* is a transaction which has everywhere been regulated by the most stringent legal provisions for the prevention of fraud and oppression. The earliest statute on the subject is 1 James 1. c. 21, and the subsequent enactments have been consolidated by 35 and 36 Vict. c. 93.

1466. The most prominent statutory requirements are—that each pawnbroker shall take out an annual licence; that he shall have his name as a pawnbroker over his door; that he shall not take pawns before or after certain hours of the day—from persons intoxicated or under twelve years of age; that he shall enter each article in a book, with a note of the name and abode of the pawner, and deliver to him a duplicate of such note, to be produced when the article is reclaimed, and shall not take a pledge unless the pawner takes the pawn ticket; that the advance shall not exceed £10 on one article, the existing Act not applying to advances beyond that sum; that each article shall be kept for a year and seven days of grace, after which it may be sold by the broker, unless in the case of notice being given for a further indulgence of three months. (See Barclay's Justice of the Peace, and M'Glashan's Digest of the Laws of Pawnbroking.) The expiration of the year does not transfer the pawn in property to the broker; it may be redeemed at any time if still unsold, unless it have been pawned for ten shillings or under, in which case it becomes the absolute property of the broker on the expiry of said time. Articles pawned for above ten shillings must be sold by public auction. (35 and 36 Vict. c. 93.)

1467. Pawnbrokers are allowed a certain profit on pawns, regulated by the amount of the loan and the time during which they remain unredeemed, according to schedule 3 annexed to the Act 35 and 36 Vict. c. 93.

1468. In order to prevent depredations by workmen and apprentices, the pawning of unfinished goods is prohibited, and also of linen or other clothing given out to wash, under penalty of double the amount of the loan, to be paid to the poor of the parish, and restoration of the pledge to the owner. (35 and 36 Vict. c. 93, sec. 35.)

1469. By the Act above mentioned it is provided that the following persons shall be deemed to be pawnbrokers within the meaning of the Act, viz.: "Every person who keeps a shop for the purchase or sale of goods or chattels, or for taking in goods or chattels by way of security for money advanced thereon, and who purchases or receives or takes in goods or chattels, and pays or advances or lends thereon a sum of money not exceeding £10, with or under an agreement or understanding express or implied, or to be from the nature and character of the dealing reasonably inferred, that such goods or chattels may be afterwards redeemed or purchased on any terms." (Sec. 6.)

1470. If any person declared to be a pawnbroker under this Act shall fail to take out the proper licence, he shall be liable to an excise penalty not exceeding £50, which shall be recoverable before a Sheriff or Justice of the Peace under the Summary Jurisdiction Act.

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## CHAPTER VII.

### BANKRUPTCY AND INSOLVENCY.

1471. Every system of bankrupt law must have the two following objects primarily in view:—*1st*, The economical realization of the funds of the bankrupt; and *2nd*, Their fair and equal application, to as great an amount as possible, to the payment of his debts.

1472. In order to the attainment of these ends, it is necessary—*1st*, That the proceedings should be carried through with as much expedition as can possibly be made to consist with justice; because, in mercantile transactions above all others, time is money. *2nd*, That all misappropriation of funds by the debtor, and all undue preference of one creditor over another, should be checked from the first moment of insolvency. *3rd*, That the estate should be placed under one mutual management for the benefit of all the creditors, and thus the expense of separate proceedings by individual creditors, which might fall to be paid by the whole estate, should be avoided. *4th*, That an effective control should be established over this management by the public judicatories of the country, so as to exclude the possibility either of partiality or of undue delay in distributing the funds. *5th*, That the judicial proceeding necessary for the adjustment of doubtful or disputed claims should be as cheap and simple as possible. *6th*, That whilst the honest debtor is discharged from his debts, or at least protected against diligence, every means should be adopted to detect fraud, to defeat concealment, to secure evidence of such offences, and to punish their perpetrator, or at least to deprive him of protection and discharge.

1473. As our limits preclude any attempt at an historical review of so wide a subject as the Bankrupt Law of Scotland, we shall endeavour to state, as concisely as possible, the special means by which the objects here enumerated have been sought to be attained by the recent "Act to Consolidate and Amend the Laws relating to Bankruptcy in Scotland" (19 and 20 Vict. c. 79 (1856), and the amending Act (20 and 21 Vict. c. 19).

1474. *Sequestration*.—A sequestration at common law is a process by which an heritable estate, regarding which a litigation is pending, is taken possession of by the Court in order to its being preserved from dilapidation, and managed under

judicial authority, till the interests of the respective claimants be ascertained.

1475. The statutory sequestration in a mercantile bankruptcy, on the other hand, is the usual, though not the only mode, by which an insolvent debtor brings himself, or is brought by his creditors, within the operation of the bankrupt laws.

1476. By this proceeding, the whole estate of the bankrupt, heritable and moveable, is removed from his control, and placed under judicial authority, in order to its being vested in a neutral person for distribution among his creditors ; whilst the creditors themselves, from being isolated individuals with opposing interests, are by the comparative equality of rights henceforth existing amongst them, all formed into one body with common interests for the attainment of a common object.

1477. As it is usually by means of a sequestration that a debtor is discharged from his obligations, and his future acquisitions protected from diligence, it is commonly granted on his own petition, with the concurrence of one or more of his creditors. The concurrence of one creditor to the extent of £50, of two to the extent of £70, or of three or more to the extent of £100, is sufficient. In addition to the prospect of ultimate discharge, the sequestration is commonly accompanied by a present protection from arrest or imprisonment for debt contracted previous to its date, until the first meeting of creditors.

1478. The circumstances in which sequestration will be granted at the instance of his creditors, where the debtor is either dead or declines to petition, are enumerated in the 13th section of the recent Act. The chief conditions are, that the debtor be notour bankrupt, and have resided, or within a year prior to the date of applying for sequestration carried on business, in Scotland. In the case of a company, it must have within the same period of time carried on business in Scotland, and one of the partners must have had a dwelling-place in

Scotland, or the company must have had a place of business in Scotland. (Guthrie's Bell's Prin. 2342 A.) Sequestration is of the whole estate of the bankrupt, consequently there cannot be two coexistent sequestrations. A foreign sequestration operates as a conveyance of the whole estate, wherever situated, of the bankrupt, in favour of the trustee or assignee, and bars subsequent sequestration in Scotland. (Goetze, 1874, 2 R. 150.)

1479. The same section introduces a very important alteration, by extending the remedy of sequestration, which was formerly confined to persons engaged in some species of mercantile or trading transactions, to all persons whatsoever. The ground of the restriction was, that as an honest bankruptcy was scarcely conceivable in the case of a person not engaged in trade, the benefits of a process, which was to terminate in discharge upon less than full payment of the debt, would in their case be little else than a premium on improvidence. The infinite ramifications of trade, whereby almost every member of the community has become a shareholder in some species of trading company, had long rendered the restriction practically inoperative; and its removal will put an end to a class of questions, the discussion of which had no other effect than to diminish the common fund for ultimate distribution. All that is now requisite is, that the applicant shall be subject to the jurisdiction of the Supreme Courts of Scotland.

1480. Where any delay occurs as to granting sequestration, or where unusual promptitude is required, either for the purpose of checking fraud or disposing of perishable goods, it is competent for the Court to which the petition has been presented, either on special application or at their own instance, to take measures for the preservation of the estate in the meantime, either by the appointment of a judicial factor, or by such other proceeding as may be judged necessary. (Sec. 16.) Formerly the temporary custody and preservation of the estate was

confided to an interim factor, elected by the creditors. The powers of the interim factor were more extensive than those of the judicial factor thus appointed by the Court, in consequence of the longer space which, under the former system, might intervene between the granting of the sequestration and the appointment of the trustee.

1481. During the short period which may still elapse before the trustee is appointed, the Sheriff has power to cause the books and papers of the bankrupt to be sealed, and to lock up his shop or other premises and keep the key, till the trustee is elected and confirmed.

1482. Another very important regulation introduced by the Act is, that sequestration may be awarded either by the Court of Session or by the Sheriff of any county in which the debtor, for the year preceding the date of the petition, has resided or carried on business; and that, in the case of two or more sequestrations being awarded by different courts, the later ones shall be remitted to the first in date.

1483. The sequestration may be opposed either by the debtor himself, who may object to a proceeding which deprives him of the capacities of a solvent person, and proclaims him as a bankrupt to the whole world; or by creditors who may have a prospect of acquiring preferences which the sequestration will destroy.

1484. A sequestration may be recalled, even after it has been granted, by a majority in number and four-fifths in value of the creditors resolving that the estate shall be wound up under a private deed of arrangement, and applying to the Lord Ordinary to sist procedure. On production to him of a reasonable deed of agreement, properly executed, the Lord Ordinary or the Sheriff will declare the sequestration at an end. It is further provided by the Bankruptcy Amendment Act of 1860 (23 and 24 Vict. c. 33), that where it shall appear to the Court of Session or the Lord Ordinary, upon a petition by the accountant

in bankruptcy, or any creditor or other person having interest, presented within three months after the date of sequestration, that a majority of the creditors in number and value reside in England or Ireland, and that from the situation of the property of the bankrupt, or other causes, his estate and effects ought to be distributed among the creditors under the Bankrupt or Insolvent laws of England or Ireland, the Court or Lord Ordinary, after such inquiry as shall seem fit, may recall the sequestration.

1485. But let us suppose that the sequestration proceeds in the usual manner.—In the deliverance by which it is granted, whether by the Lord Ordinary or the Sheriff, the creditors are appointed to meet at a specified place and hour on a specified day, which shall not be less than six or more than twelve days from the date of the notice of sequestration, which the Act requires to be inserted in the *Edinburgh Gazette* (23 and 24 Vict. c. 33, sec. 5), for the election of a trustee or of trustees in succession. (Sec. 67.) The trustee in a mercantile sequestration under the bankrupt statutes differs from a judicial factor in a sequestration at common law in this essential point, that whereas the former is an administrator merely, the latter is a distributor of the estate entrusted to him. “The general description of the office and duties of the trustee,” says Mr. Bell, “is this: He is the trust proprietor and manager of the estate and effects; the judge, in the first instance, of all claims of debt and preferences, and the distributor of the divisible fund.”

1486. As it is a matter of the highest importance that the trustee shall be impartial, it is enacted (sec. 68) that it shall not be lawful to elect the bankrupt, nor any person “conjunct or confident” with him, or whose interests are opposed to the general interests of the creditors. The trustee must also be resident within the jurisdiction of the Court of Session. It is neither unlawful nor unusual for a creditor to be trustee where

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he has no material interest adverse to that of the other creditors. On the same ground, whoever is the mere creature of a person who would be ineligible himself, is ineligible. It is for the creditors to judge of the respective qualifications of rival candidates for the office of trustee, and the Court will not interfere with their decision.

1487. If two or more creditors shall give notice to the Sheriff of the county, he shall attend either in person or by his substitute, and preside at the meeting for the election of the trustee. The Sheriff-clerk or his depute must also be present, and write the minutes in presence of the meeting, and perform the other duties of clerk.

1488. When the Sheriff is not present, the creditors elect their own preses, and, when the Sheriff-clerk is not present, their clerk. The minutes must be signed by the person who presides, and they ought strictly to be written and executed in presence of the meeting. They begin by a list of the persons present, and this forms the record of voters. They also contain a statement that the vouchers, grounds of debt, and oaths of verity have been regularly produced, and that the mandates of those creditors who claim to vote by agents were shown to the meeting. The amount of debt on which each claimant votes should also be set forth. (Sec. 68.)

1489. The creditor is bound in his oath to put a specific value on any security which he may hold for his debt over the bankrupt estate, and to deduct its value from the debt. He is then entitled to vote on the balance. If the creditor has an obligant bound to him along with the bankrupt, such obligation shall be valued and deducted in the same manner. The like deductions must be made to entitle the creditor to be ranked in order to draw a dividend, and, on payment of the balance, the trustee is entitled to a conveyance of the security for behoof of the estate.

1490. The creditors and their mandatories, thus entitled to

vote, shall then and there elect a fit person to be trustee. (Sec. 68.)

1491. The election of the trustee, and all other questions at meetings of creditors not otherwise provided for, are decided by the majority *in value* of those present and entitled to vote. (Sec. 101.)

1492. If there be no competition or objection, the Sheriff, if present, declares the person chosen to be trustee by a deliverance on the minutes, or, if absent, on the proceedings being reported to him by the preses.

1493. If there be competition or objections to candidates, such objections shall be stated at the meeting, and the Sheriff may either decide them forthwith or take them to *avizandum*. If he should adopt the latter course, he is to make a note of the objections and answers, and to hear the parties on them *viva voce* within four days. (Secs. 69 and 70.) The Sheriff shall then pronounce a judgment, declaring the person whom he shall find to have been elected to be trustee. This judgment shall be given with the least possible delay, and shall be final, and in no case subject to review in any court or in any manner whatever. (Sec. 71.) Wherever objections have been stated to the trustee elected by the majority, it is prudent to elect another trustee or trustees, who shall succeed to the office in case of the election of the first being annulled. If this arrangement, which the statute authorizes, be neglected, the whole election will be annulled, should a personal objection to the first trustee be sustained by the Sheriff. (Bell's Com. p. 1224.)

1494. A creditor is not excluded from voting in the election though he should be himself ineligible.

1495. Where the estates both of a company and of the individual partners are sequestrated, the two sets of creditors may concur in electing the same trustee.

1496. The creditors, at the meeting at which the trustee is elected, are to fix a sum for which he shall find security,

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and decide on the sufficiency of such security as he may offer. (Sec. 72.)

1497. Unless the creditors limit the sum, the Court will require security for the whole intromissions.

1498. On the decision of the Sheriff declaring the person duly elected, and on a bond by the trustee and his cautioner being lodged, the Sheriff shall confirm the election, and his confirmation shall be final; and the Sheriff-clerk shall issue an act and warrant to the trustee, who shall immediately transmit a copy of it to the accountant in bankruptcy, in order that his name and designation may be entered in the register of sequestrations. This act and warrant shall be a title to the trustee to perform the duties imposed by the Act, and shall be evidence of his right and title to the sequestrated estates, both heritable and moveable. It also vests in the trustee all real estate in England, Ireland, and the Colonies, provided it be registered in the chief Court of Bankruptcy for the country in which the property is situated. (Sec. 73.)

1499. *Commissioners.*—After the election of the trustee, the creditors are to elect, at the same meeting, three commissioners, who must be either creditors or mandatories of creditors. The proceedings are the same as those for the election of the trustee; and no person shall be qualified who was not eligible as trustee. The commissioners are not required to find security. (Sec. 75.) A majority of the creditors, assembled at any meeting duly called for that purpose, may remove a commissioner and elect another in his place. (Sec. 76.)

1500. The commissioners are a committee of the creditors for assisting the trustee in the management of the estate, and superintending his proceedings, and concurring with him in submissions and transactions. To them also is entrusted the important duty of declaring the dividends. (Secs. 125, 130, and 132.) Any commissioner may make such report as he thinks fit to a general meeting of creditors.

1501. *Removal of Trustee and Commissioners.*—A majority in number and value of the creditors, present at any meeting duly called for the purpose, may remove the trustee or accept his resignation. One-fourth of the creditors in value may at any time apply to the Lord Ordinary for the trustee's removal; and if the Lord Ordinary be satisfied that sufficient reason has been shown, he shall remove the trustee, and appoint a meeting of creditors to be held, for devolving the estate on the trustee next in succession, or electing a new one. (Sec. 74.)

1502. The accountant in bankruptcy, appointed by sec. 156, is required to take cognisance of the conduct of all trustees and commissioners; and in the event of their not faithfully performing their duties, to report the same to the Court of Session; who, after hearing such trustees or commissioners, shall have power to censure or remove them from their office, or deal with them otherwise as justice may require. (Sec. 159.)

1503. Each trustee must make an annual return, through the Sheriff-clerk, to the accountant of the position of the estate under his charge; and any trustee failing to make such return shall be removable at the instance of the accountant or of one creditor, be subject to such censure as the Lord Ordinary may think suitable, and be found liable in expenses.

1504. Where the trustee is removed by a majority of the creditors, it is not necessary that any cause should be assigned.

1505. The trustee cannot resign against the wish of the creditors; and even a resolution by a majority in value and number to accept his resignation may be brought under review of the Court.

1506. *Trustee's Inventory.*—As soon as the trustee has taken possession of the bankrupt's estate, he must make up an inventory and valuation, and transmit a copy thereof to the accountant. (Sec. 80.)

1507. The bankrupt is bound to afford to his creditors every information regarding his property, both actually existing and

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in expectancy, and so aid the trustee in the execution of his duty. In case of his failure to do so, or to grant any deed requisite for the recovery or disposal of his estate, the trustee may apply to the Sheriff, who, unless cause be shown to the contrary, shall grant a warrant for his imprisonment. (Sec. 81.) For his sustenance whilst engaged in the duties imposed on him, an allowance is made to the bankrupt, the maximum of which, except in extraordinary circumstances, is fixed at three guineas a week. (Sec. 77.)

1508. *Examination of the Bankrupt.*—Within eight days after his confirmation, the trustee must apply to the Sheriff to fix a day for the public examination of the bankrupt; whereupon the Sheriff issues a warrant for him to attend within the Sheriff-Court house on a specified day, not sooner than seven or later than fourteen days from the date of the warrant. The examination, taken upon oath, is written or dictated by the Sheriff, and authenticated as a regular deposition. If the bankrupt refuse to answer questions, or to produce books, deeds, and other documents, without lawful cause shown, he may be committed to prison by the Sheriff. He is not bound to answer any question that has a tendency to criminate himself; but he must submit to the risk of his refusal involving him in the guilt of undue concealment, if there be any property thereby left unaccounted for. (Sec. 87.)

1509. The Sheriff cannot, in the course of the examination, legally commit for punishment of prevarication, perjury, or concealment, as crimes. The remedy is under the criminal law, by a commitment for trial, on due application being made. The proper commitment, where there is no new application of a criminal nature, is simply "till he shall make a full and satisfactory answer to the question put," and this question ought to be specified in the warrant. (Bell's Com. 1239, Shaw's edition.)

1510. *Examination of Conjunct and Confident Persons.*—The Sheriff may at any time, on the application of the trustee, order an examination of the bankrupt's wife and family, clerks, servants, factors, law agents, and others who can give information relative to his estate, and issue his warrant for their appearance. (Sec. 90.)

1511. Although by the common law a wife is not a competent witness for or against her husband, yet by the statute she may be examined for the discovery of the estate concealed, kept, or disposed of by herself or others whom she has employed.

1512. *Discharge of the Bankrupt on Composition.*—An offer of composition on the whole debts, with security for payment of the same, may be made, either by the bankrupt or his representatives, at the meeting for the election of the trustee, or at the subsequent meeting; and if this offer be entertained and finally accepted by a majority in number and four-fifths in value, the bankrupt, on making a declaration on oath before the Sheriff or Lord Ordinary, to the effect that he has made a full and fair surrender of his estate, shall be discharged of all debts and obligations for which he was liable at the date of the sequestration; and the sequestration shall be at an end, and the bankrupt reinvested in his estate, reserving the claims of the creditors for the said composition against him and the cautioner. (Secs. 137, 138, 139, 140.) But the sequestration shall go on notwithstanding any offer of composition, and the trustee shall proceed as if no such offer had been made, until the deliverance by the Lord Ordinary or Sheriff, when the sequestration shall cease, and the trustee be exonerated and discharged. (Sec. 142.) If the offer of composition be rejected, no other can be entertained unless nine-tenths of the creditors ranked shall agree. The bankrupt, although reinvested in his estate, has no right to challenge any debt given up in his state of affairs, nor to object to any security held over his estate, unless the objection to such

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debt or security shall have been intimated in the offer of composition, and notice in writing given to the creditor.

1513. *Discharge of Bankrupt without Composition.*—1<sup>st</sup>, The bankrupt may, at any time after the meeting held after his examination, petition the Lord Ordinary or Sheriff for his discharge, provided every creditor shall concur in the petition; 2<sup>nd</sup>, He may present such petition on the expiration of six months from the date of the deliverance awarding sequestration, provided a majority in number and four-fifths in value of the creditors concur; 3<sup>rd</sup>, He may do so on the expiration of eighteen months after said deliverance, with concurrence of a majority in number and value; or 4<sup>th</sup>, He may do so on the expiration of two years from the same date, without any consent of creditors. If there is no opposition, the Sheriff shall grant the discharge in twenty-one days after the petition has been intimated in the *Gazette*; and if appearance is made, he shall dispose of the objections and grant the discharge, or delay it, or refuse it, as he may see cause. (Sec. 146.) It is provided, however, by the Bankruptcy Amendment Act of 1860, 23 and 24 Vict. c. 33, sec. 3, that either the Court of Session, or the Lord Ordinary, or the Sheriff, may refuse the application for discharge, although two years have elapsed from the date of the sequestration, and although no appearance or opposition shall be made by or on the part of any of the creditors, if it shall appear from the report of the accountant in bankruptcy, or other sufficient evidence, that the bankrupt has fraudulently concealed any part of his estate or effects, or has wilfully failed to comply with any of the provisions of "The Bankruptcy (Scotland) Act, 1856."

1514. [The Bankruptcy and Cessio Act, 1881 (44 and 45 Vict. c. 22, sec. 6), now provides that the bankrupt shall not be entitled to his discharge unless it be proved to the Court either that a composition of not less than five shillings has been paid, or security for it given to the satisfaction of the creditors; or

[that the failure to pay that amount is due to circumstances for which the bankrupt is not responsible.]

1515. *Notour Bankruptcy*.—In order to render more effectual what were in reality the principles of the common law, and check, if possible, the complicated frauds so frequently practised on the eve of bankruptcy, it was provided, by 1621, c. 18, that no debtor after insolvency should fraudulently diminish the funds, which in reality belonged not to him, but to his creditors; and, further, that fraudulent dealing should be presumed if the deed was gratuitous, executed after the contracting of debt, and in favour of a near relation or a confidential friend. The subsequent Act, 1696, c. 5, declared that all voluntary dispositions, assignations, and other deeds, granted by the bankrupt, at or after the time of his bankruptcy, or within sixty days of it, in favour of a creditor, either in satisfaction or further security of debt, should be null. These provisions have been retained, and others with a similar object introduced, by subsequent enactments. (Secs. 107 to 111.) All alienations not subject to these or any other objections, either statutory or at common law, fall, like preferable and protected debts, to be deducted in the first instance from the fund for distribution among the creditors; and hence, with reference to the interruption of prescription in Scotland, the statute of limitations in England, and for many other purposes, as well as with a view to subsequent acquisitions, the importance of fixing the precise period at which legal bankruptcy takes place.

1516. By sec. 7 of the Bankruptcy Act, it is provided that notour bankruptcy in the case of an individual shall be constituted by the following circumstances:—

1517. 1. By sequestration in Scotland, or by the issuing of an adjudication of bankruptcy in England or Ireland.

1518. 2. By insolvency, concurring either—(1) with a duly executed charge for payment, followed, where imprisonment

[(now abolished, *vide infra*)] is competent, by imprisonment ; or (2) formal and regular apprehension of the debtor ; or (3) by his flight or absconding from diligence ; or (4) retreat to the sanctuary ; or (5) forcible defending of his person against diligence ; or, where imprisonment is incompetent or impossible, (6) by execution of arrestment of any of the debtor's effects not loosed or discharged for fifteen days, or by execution of poinding of any of his moveables, or by decree of adjudication of any part of his heritable estate for payment or in security.

1519. 3. *Notour Bankruptcy will farther be constituted*—By insolvency concurring with (1) sale of any effects belonging to the debtor under a poinding ; or (2) under a sequestration for rent ; or (3) with his retiring to the sanctuary for twenty-four hours ; or (4) with his making application for the benefit of *cessio bonorum*.

1520. [The Debtors Act, 1880 (43 and 44 Vict. c. 44), has abolished imprisonment for civil debt with certain exceptions, and provided certain fresh tests (in addition to those just enumerated) of notour bankruptcy where imprisonment is incompetent. It is now constituted "by insolvency concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment, or, where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the lapse of the days intervening prior to execution without payment having been made." The debts for which imprisonment is still competent are—(1) taxes, fines or penalties due to Her Majesty, and rates and assessments lawfully imposed ; (2) sums decerned for aliment. Committal and period of imprisonment are regulated by the amending Act of 1882 (45 and 46 Vict. c. 42).]

1521. Sec. 8 enacts, that in the case of a company, notour bankruptcy shall be constituted either in any of the foregoing ways, or by any of the partners being rendered notour bankrupt for a company debt.

1522. Notour bankruptcy commences from the time when its several requisites concur, and continues till the debtor obtains his discharge, or till insolvency ceases. (Sec. 9.)

1523. Many nice questions have arisen in regard to securities granted in implement of obligations contracted prior to the commencement of the statutory period ; and there are numbers of perplexing decisions. Two rules, however, may be laid down as settled law. (1.) Where debt is contracted, and no security given but merely promised without the subject of it being specified, a security subsequently given, if within the period of constructive bankruptcy, is reducible as being for a prior debt. (2.) Where an advance of money is made on the faith that a specific subject is to be given in security of it, the security is good although given at a later date, and within the sixty days of bankruptcy. (*Stiven and Co. v. Scott and Simson*, June 30 1871, 9 M. 923.)

1524. *Ranking*.—The general rule of ranking is, that all arrestments and poidings which have been used within sixty days prior to the constitution of notour bankruptcy, or within four months thereafter, shall be ranked *pari passu*, as if they had all been used of the same date.

1525. *Cessio Bonorum*.—This equitable process for the relief of the debtor from the severity of the early laws of imprisonment for debt, was introduced into the Roman law by Julius Cæsar. From this source it was borrowed by us, probably passing through the medium of the law of France. (See its History in Bell's Com. (Shaw's ed.) vol. ii. p. 1092.)

1526. The jurisdiction in cessios, which formerly belonged exclusively to the Court of Session, was, by 6 and 7 Will. iv. c. 56, extended to Sheriffs [in whose Court it must now be raised in the first instance, with appeal to the Court of Session (39 and 40 Vict. c. 70, sec. 26)]. The following are the leading provisions of [these statutes], [which, along with the Debtors Act, constitute the "Cessio Acts"] :—

1527. Any debtor [who is notour bankrupt, or any creditor of such debtor (43 and 44 Vict. c. 34, secs. 7 and 8)], may apply for decree of cessio. [If the petition be at the debtor's own instance], it sets forth his inability to pay his debts, and his willingness to surrender his estates; [if at that of a creditor, it prays that the debtor be ordained to do so; and for the appointment of a trustee. It must contain a list of all the creditors, and along with it must be produced evidence of the debtor's notour bankruptcy]. The petition is intimated to the creditors in the *Gazette*, and the bankrupt lodges a state of his affairs, subscribed by himself, with all books and papers relating to his affairs, with the Sheriff-clerk. On a day appointed for compearance, the debtor is examined before the Sheriff on oath; and if the creditors object to the petition, they are heard, and if necessary, a proof is allowed. The Sheriff may either grant decree or refuse it, or make such other order as to him may seem just,—his order being subject to review by the Court, or the Lord Ordinary in vacation.

1528. Any one of the creditors may appear in this action; and the pursuer will not be allowed the benefit of the process till he has satisfied the Court that his inability to pay his debt has arisen from misfortune, and that his disclosure of the state of his affairs is full and honest. The burden of proving his objections, however, will be laid on the creditor.

1529. A decree of cessio operates as an assignation of the debtor's moveables for behoof of the creditors, in favour of the trustee mentioned in the decree.

1530. Trustees in cessios, like those in sequestrations, are now placed under the supervision of the accountant in bankruptcy by sec. 167 of the Bankrupt Act.

1531. A decree of cessio [formerly differed] from a sequestration, in conferring on the bankrupt no power to insist on his discharge; and it [afforded], consequently, no protection against the attachment of his subsequent acquisitions by his creditors.

[Now, however, by the Bankruptcy and Cessio Act, a debtor in respect to whom decree of cessio has been pronounced, is entitled to be discharged six months after the decree, under the conditions imposed by sec. 146 of the Bankruptcy Act (*supra*, sec. 1513) in the case of sequestrations, and under a similar provision with regard to a dividend of five shillings imposed in cessios themselves by sec. 7 of the Bankruptcy and Cessio Act.]

1532. The debtor has the privilege of retaining his working tools ; but nothing beyond a mere aliment will be allowed, even to half-pay officers and clergymen.

1533. Section 168 of the Bankruptcy Act provides that a majority in number and value of the creditors, if it shall appear to them that the estate is not likely to yield free funds for division after payment of preferable debts and expenses beyond £100, may resolve that the bankrupt shall only be entitled to apply for a decree of cessio, and shall have no right to a discharge in the sequestration. This resolution may be brought under review of the Lord Ordinary or the Sheriff ; but if it is confirmed, the bankrupt shall have no right to a discharge in the sequestration, but shall be entitled to apply for a decree of cessio, and the Court shall have power to grant the cessio in the sequestration, without requiring the bankrupt to bring a separate process ; and in all other respects the sequestration shall be proceeded with in common form.

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## CHAPTER VIII.

### OF BILLS AND PROMISSORY NOTES.

1534. The constant occurrence of pecuniary transactions amongst merchants has led them, in all civilised countries, to adopt expedients for cancelling their obligations to each other,

without the trouble and risk attendant on the actual transmission of money, and for avoiding the inconveniences inseparable from delay, by substituting credit for present payment.

1535. Bills of exchange, inland bills, and promissory notes, the instruments by which these objects are usually effected, are the simplest in form, whilst at the same time they are the most rapid in execution, of all obligations known in law.

1536. Like all other mercantile instruments, they are exempted from the cumbrous forms of authentication required in common deeds, and this exemption they enjoy even when employed in the constitution of ordinary money obligations. Neither in this nor in other respects is there any distinction in law between these instruments when applied to mercantile and non-mercantile transactions; and as they are now very extensively employed in the latter, it is requisite that the danger of forgery, to which their mercantile privileges expose them, should be guarded against by the strictest conformity to such rules as law and custom have imposed on them.

1537. In addition to that just mentioned, bills and notes possess two other remarkable privileges, viz. transmission by indorsation, or simple delivery, and summary execution.

1538. To the first they are indebted for the great value which they possess as circulating media in trade; by the second, a cheap and efficacious method of enforcing the obligations which they constitute is supplied, without the intervention of litigation.

1539. *A Bill of Exchange* is a request, in the form of an open letter, addressed by a person called the drawer to his debtor or correspondent abroad, who is called the drawee, desiring him to pay to a third person, usually the creditor of the drawer, called the payee or porteur, a sum of money within a certain time after date, or on demand, or on sight, [or after sight,] of the bill. After the bill has been signed by the person to whom it is addressed (the drawee), in token of his willingness to comply

with the request which it conveys, he is then called the *acceptor*. The bill then constitutes a debt against him in favour of the payee, and has the same effect as if money for the use of the latter had been actually transmitted and lodged with the acceptor. (Stair, i. 11. 7; Ersk. iii. 2. 25; Bell's Com. i. 386; Bell's Prin. 306.)

1540. To obviate the risk of loss, it is usual to draw foreign bills in sets of two or three, and to transmit them by different conveyances.

1541. Though no express form of words is legally requisite in mercantile instruments, custom has fixed certain modes of expression from which it is scarcely safe to deviate. The following is the usual form of an ordinary foreign bill:—

£100 sterling.

Glasgow, March 1, 1884.

At sixty days after sight (or other future time) of this my (first) of exchange, second and third of same date and tenor being unpaid, pay to my order (or to C. D. or order) the sum of one hundred pounds sterling, for value as advised.

(Signed)

A. B.

B. C. and Co.

To Messrs. B. C. and Co.,

Merchants, Trieste.

(Date acceptance.)

1542. Bills or notes for sums under 20s. are absolutely void.

1543. [The whole law relating to bills of exchange and promissory notes has been recently codified for the three kingdoms by a single statute, the Bills of Exchange Act, 1882 (45 and 46 Vict. c. 61). The Act is mainly a codification of the common law and the law merchant (the rules of which are declared (sec. 97) to be, so far as not inconsistent with its provisions, still in force), and a re-enactment of the former statutory law, though some of the provisions are novel. The laws of the three

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[kingdoms are, to a greater extent than formerly, assimilated, though on some points the law of Scotland still retains its own peculiar provisions, differing from those of England and Ireland, while on others the practice, which was previously that of Scotland only, has been adopted for the United Kingdom.

1544. [*Definition.*—The Act defines a bill as “an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer.”

1545. [If it orders any act to be done in addition to the payment of money, it is not a bill. The bill is also vitiated if the order be to pay the sum mentioned out of any particular fund. But where the order to pay is unqualified, a particular fund out of which it is to be paid, or a particular account to be debited with it, may be indicated in the bill, and a reference to a particular transaction which gave rise to it, as “on account of money advanced to me by A. B.,” or the like, is unconditional. (Sec. 3.) (*Griffin v. Weatherby*, L. R. 32 Q. B. 753 ; *Macfarlane*, 1864, 2 M. 1210.)

1546. [A bill is not invalid by being undated, post-dated, ante-dated, or dated on Sunday. But when it is made payable so many days after its date, the date is necessarily essential. Any holder may insert the true date of issue or acceptance in an undated bill, or correct an erroneous date inserted by a previous holder. The date of drawing, acceptance, or indorsement on a bill is presumed to be the true date, but it may be disproved by parole evidence. (Secs. 3, 12, 13, 100.)

1547. [*Inland and Foreign Bills.*—“An inland bill is a bill which is, or on the face of it purports to be, (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other

[bill is a foreign bill." British Islands means the United Kingdom, the Isle of Man, and the Channel Islands. (Sec. 4.)]

1548. [The following is its simplest form :—

£100.

Leith, March 1, 1884.

Three months after date, pay to me, or order, the sum of one hundred pounds sterling for value.

(Signed) A. B.

C. D.

To C. D., Grocer,  
Edinburgh.

1549. [Where the drawer and drawee are the same person, or where the drawee is a fictitious or legally incapable person, the instrument is either a bill or a promissory note, in the option of the holder. (Sec. 5.) (Bell's Com. ii. 515.)]

1550. [The drawee, and, where not payable to bearer, the payee, must be named in the bill or indicated with reasonable certainty, as "to the Secretary of X. Co." A bill may be addressed to two or more drawees, but not to two in the alternative, or in succession, though it may be made payable to two or more payees jointly, or in the alternative. (Secs. 6 and 7; Ersk. iii. 2. 26; Duncan's Trs., 1872, 10 M. 984; M'Cubbin, 1856, 18 D. 1824.)]

1551. [All bills and promissory notes are "negotiable" (*i.e.* transferable by delivery merely) at once, where payable to bearer, and where payable to order, after indorsement, unless they contain words prohibiting transfer. Bills containing such words are effectual only between the parties. The prohibition may be direct, as by writing "not negotiable" upon it, or by indication, as by the words "for my use," or "for collection." (Sec. 8.)]

1552. [The sum in a bill must be payable in money, that is, in coin, not in commodities or even in bank notes; but it may be made payable with interest, or by instalments, or according to a certain rate of exchange. Interest, unless otherwise provided

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[in the bill, runs from its date, or, if undated, from its issue. (Sec. 9.) Where the rate of interest is unexpressed, five per cent. is understood. If expressed, it must be in such a way that the sum may be clearly ascertainable. (Morgan, 1866, 4 M. 321; Tennent, 1878, 5 R. 433; Vallance, 1879, 6 R. 1099.) The amount may be expressed in words or figures, or both; if the latter, and there is a discrepancy, the amount in words prevails. (Sec. 9.)

1553. [*Legal Tender*.—Money means legal tender, and that is coin only, unless otherwise provided by statute. Gold is tender to any amount, silver up to forty shillings, bronze up to one shilling (33 Vict. c. 10, sec. 4). By 3 and 4 Will. iv., notes of the Bank of England, payable to bearer on demand, are legal tender to their amount in England for all sums above £5, except by the Bank itself, which is bound to pay in legal coin. The Act, however, does not extend to Scotland. The notes of Scotch banks are not legal tender anywhere.

1554. [Bills are payable either “on demand” (which includes “at sight,” or “on presentation”) or at a fixed or a determinable future time, which may be either at a fixed period after date or sight, or after the occurrence of a specified event certain to happen, though the time of happening may be uncertain. A writing made payable on a contingency is not a bill, though it may not on that account necessarily be invalid as a document of debt. (Sec. 11.)

1555. [*Time of Payment*.—*Days of grace* are an indulgence of three days granted in addition to the time specified for payment. These are not allowed on bills payable on demand. Where they are allowed, the bill is payable on the last day of grace. When it falls on Sunday, Christmas day, Good Friday, or a day appointed by royal proclamation for a public fast or thanksgiving, then on the day preceding. But where the last day falls on a bank holiday or on a Sunday immediately succeeding a bank holiday, then on the *succeeding* business day. (Sec. 14.)

1556. [*Acceptance*.—"The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer." It must be written on the bill, but signature alone is sufficient. It promises performance by payment of money, and by no other means. (Sec. 17.) An acceptance to pay in bank notes has been held invalid. (Imeson, 2 Rose's Bankruptcy Cases, 225.)

1557. [Acceptance is either general, *i.e.* acceding to the whole order of the drawer, or qualified. It may be qualified by a condition stated, or by undertaking to pay only in part, or only at a particular place or time. It cannot be for a sum larger than that named in the bill. (Sec. 19.) Acceptance "as executor," or "as trustee," or "as cautioner," is an absolute acceptance, and the addition has no effect against a holder. (Bell's Prin. 318; Brown, 1875, 2 R. 615; Walker's Trs., 1880, 7 R. H. L. 85.)

1558. [*Delivery*.—The fact alone of signing one's name to a bill does not bring a person under liability in any character; there is required also delivery of the instrument, *i.e.* transference of its possession, actual or constructive, from one person to another. Until this takes place the signatory's contract is incomplete and revocable. (Sec. 21.) (Martini and Co., 1878, 6 R. 342.) Delivery of bills and promissory notes is governed by the rules applicable to the delivery of deeds in general. (Bell's Prin. 23; Miller, 1874, 1 R. 1107.) This rule is, however, subject to one exception, namely, that where the acceptor has signed the bill and intimated his acceptance to the person entitled to have delivery of it, he has then made the contract as regards himself irrevocable. When the signatory of a bill has parted with it, delivery of it by him to the holder is presumed till the contrary is proved. (Ib.)

1559. [*Capacity of parties*.—"Capacity to incur liability as a party to a bill is co-extensive with capacity to contract." (Sec. 22.)

1560. [*Minors* have the same power to contract by bill as they have in respect to moveables generally. But the rules for their

[protection are so far modified in relation to their bills and notes that they are effectual to a *bona fide* holder for value paid, or where they are granted in the line of a trade in which the minor is actually engaged, or where he has fraudulently held himself out as of full age. (*Craig v. Grant*, July 5, 1732, M. 9035 ; *Macdonald*, 1789, M. 9038.)

1561. [*Married Women*.—As the personal obligations of a wife are null, she cannot grant or indorse bills. Bills payable to a wife belong to her husband, and may be indorsed by him. (Sym, Nov. 25, 1825 ; Jeffrey, June 28, 1826 ; Walker, Dec. 4, 1827 ; Earl of Strathmore, June 19, 1832.) This rule is subject to the exceptions already stated (*ante*, p. 16) as to married women's capacity in general.

1562. [*Joint-Stock Companies and Corporations*.—Bills are made, accepted, and indorsed for a joint-stock company by any person acting under the authority of the company (25 and 26 Vict. c. 89, sec. 47), which is generally provided for in the articles of association. A bill granted by any person not so authorized will not bind the company.

1563. [No one can incur liability under a bill except by signing it, and that he can do only in one of three capacities,—as drawer, acceptor, or indorser. (Sec. 23.) Any one signing by an assumed name used in trade is bound as if he had signed his own proper name. (*Walker's Trs.*, *supra*.)

1564. [A signature forged or placed on a bill without the authority of the person whose signature it purports to be, can never found any right to enforce payment of the bill against any party unless the party whose signature has been so affixed has adopted it as his own. (Sec. 24.) (*M'Kenzie*, 1881, 8 R. H. L. 8, with review of Scottish authorities, per Lord Watson.) When a party comes to know that his signature has been forged to a bill, mere delay in giving notice of the forgery to the holder will not necessarily imply adoption of the forged signature, nor bar him from repudiating liability, unless the holder or others have been

[prejudiced by his silence. The burden of proving the adoption of the signature lies on the holder.

1565. [Bills may be drawn, accepted, and indorsed by procuration, and any person capable of doing so may authorize another person to do so for him even though that person—as a minor (M'Michael, 1840, 3 D. 279) or a married woman (Fraser, H. and W. 513)—have not himself the capacity of doing so. But the principal will be bound only if the agent were acting within the scope of his authority. For instance, a mandate to draw will not authorize indorsation (Robinson v. Varrow, 7 Taunton, 455), or to sign in one course of business extend to doing so in another. (Union Bank, 1873, 11 M. 499.) The mandate may be given verbally or in writing, or may be inferred from facts and circumstances.

1566. [An agent signing a bill for a principal is not personally liable under it if he have added words to his signature indicating that he signs for him. But the mere addition to his signature of words describing him as agent, or as filling a representative character, will not exempt him from liability. For example, an acceptance “as cautioner” or “as executor” is an absolute acceptance (*supra*, sec. 1557), and so also “as trustees” of a joint-stock association. (Brown, 1875, 2 R. 615.)

1567. [By the law of England a bill must be granted for value. By the common law of Scotland (Bell's Prin. 8, 63–4) it is not necessary that any obligation should proceed upon a valuable consideration, and the Act (sec. 27) does not seem to have altered this. (See Thorburn, Commentary, pp. 76, 77.)]

1568. *Accommodation Bills*.—Besides the proper use of bills and notes, in transmitting money, and bringing into a discountable form the price of goods sold on credit, so that the debt may at once be used as money, there is another purpose to which they have been applied,—viz. to raise money by discounting at a banker's, bill-broker's, or elsewhere, a bill to which a friend who is not a debtor lends his credit. Such bills are called

*accommodation* or *wind* bills. (Bell's Com. i. 426 ; Bell's Prin. 346.

1569. The understanding is, that the person for whose accommodation the bill was made, is to provide his friend with the means of paying it, or is himself to retire it ; and if he acts in accordance with this understanding, the transaction is closed. Such bills are simply a "loan of credit." This mode of raising money is frequently done in consideration of a commission ; and not unfrequently by means of a course of bills, drawn or redrawn at enormous expense. Persons requiring this sort of accommodation usually agree with others in the same position to draw on each other, or they exchange acceptances, or what Mr. Bell characterizes as the "more dangerous instruments called *skeleton bills*." Sometimes several houses are engaged in this traffic ; and the creation of fictitious firms, the use of feigned names, the careful avoidance of the same train of discounts, are some of the many discreditable expedients to which it too frequently leads.

1570. [The definition of the Act is—"An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person." Such party is liable to a holder for value, whether the holder knew when he took the bill that he was an accommodation party or not. (Sec. 28.)

1571. ["*A holder in due course* is a holder who has taken a bill completed and regular on the face of it," provided (1) he takes it before maturity, and without notice of its having been dishonoured ; and (2) that he takes it in good faith for value (*supra*, sec. 1567), and without having notice of any defect in the title of the person from whom he took it. A title to a bill is defective when the person who negotiates it has obtained it, or the acceptance of it, by fraud, force or fear, or other unlawful means, or when he negotiates it in breach of faith, or in

[circumstances amounting to fraud. (Sec. 29.) As to what constitutes force and fear, see *Gelot v. Stewart*, 8 M. 649.

1572. [*Negotiation* is the transference of a bill from one person to another, so that the latter becomes "holder," i.e. payee. Bills payable to bearer are negotiated by delivery merely; those payable to order by indorsement completed by delivery. It was formerly the law in Scotland, that where a bill payable to order was transferred without indorsement the transferee acquired no title to it, while in England it was held that he acquired a title in equity. The Act has now adopted the English practice for the United Kingdom, by enacting that in such case the transferee acquires such title as the transferor had in the bill, and in addition the right to have the latter's indorsement. A person indorsing a bill in a representative capacity may add words to his signature negating personal responsibility. (Sec. 31.)

1573. [*Indorsement* must be written on the bill (signature alone being sufficient), and must be of the entire bill, and may be in pencil. (*Geary v. Physic*, 5 B. and C. 234.) An order to pay a part of the bill, or to two or more indorseees severally, does not operate a negotiation of the bill. A bill to order with two or more payees must be indorsed by all, or by one having authority for the others (as in partnership). Where the name of the payee is misspelt, or he is wrongly designated, he may indorse as described, adding, if he please, his correct signature; and it is to be recommended that he should do so to secure summary diligence. An indorsement may be blank—in which case the bill becomes payable to bearer—or it may be special, i.e. specifying the person to whom, or to whose order, the bill is made payable. (Sec. 32.) An indorsement may also be *conditional*; but the payer may disregard the condition, and payment to the indorsee is valid whether the condition have been fulfilled or not. (Sec. 33.) Indorsement may also be *restrictive*, i.e. one which prohibits the further negotiation of the bill, or prescribes how it is

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[to be further dealt with, as—"Pay D. only," or "Pay D. for the account of X.," or "Pay D., or order, for collection." Under such indorsement the indorsee has no power to transfer his rights to the bill except as expressly authorized in the indorsement. (Sec. 35.)

1574. [The rights and powers of the holder of a bill are—(1) He may sue on it in his own name; (2) where he is holder in due course, any defects in the title of prior holders, or mere personal defences proper to them among themselves, do not affect his right, and he may enforce payment against all parties liable under it; (3) though his own title be defective, he can by negotiation confer an unexceptionable title on a subsequent holder in due course, and can also give a valid discharge to any one paying to him. (Sec. 38.)

1575. [*Presentment for Acceptance* is necessary only—(1) where a bill is payable after sight in order to fix the date of maturity; (2) where it is expressly stipulated for in the bill; (3) where the bill is payable elsewhere than at the residence or place of business of the drawee. (Sec. 39.)

1576. [If the holder of a negotiated bill payable after sight do not present it for acceptance, or negotiate it further, within a reasonable time the bill ceases to be valid, and the drawer and all prior indorsers are discharged. In determining what is a reasonable time, regard is to be had to the nature of the bill, the custom of trade, and the facts of the particular case. (Sec. 40; Thorburn, p. 101.)

1577. [Presentment must be made at a reasonable hour, for example, within business hours or bank hours (if the drawee be in business, or a banker), and on a business day, and before the bill is overdue. When the bill is addressed to two or more drawees, presentment must be made to each, unless they are partners. (Sec. 41; Bell's Prin. 336; Neilson, 1843, 5 D. 513; 1844, 6 D. 622.) Where authorized by agreement or usage, presentment through the post is sufficient, and the holder is not responsible for delay or accidents occurring in the post office.

[(Higgins and Sons, 1847, 9 D. 1407, H. L. 6 Bell's App. 195 ; Household Fire Ins. Co. v. Grant, 4 Exch. Div. 216, with full review of cases ; Thorburn, p. 110.) Bills are usually left for acceptance for twenty-four hours, but the custom may vary.

1578. [*Presentment for Payment* must be made—where the bill is not payable on demand—on the day on which it falls due ; where payable on demand, within a reasonable time after issue or indorsement. It must also be presented at the proper place, that is to say, (a) at the place specified ; (b) where no place is specified, at the drawee's address, if that be given ; (c) if it be not given, at his place of business, if known ; (d) if it be not known, at his ordinary residence ; (e) where he can be found, or at his last known place of residence. It must be made to each of several drawees or acceptors, if not partners ; and may, if sanctioned by usage, be made by post. (Sec. 45.)

1579. [Presentment is dispensed with where, after due diligence used, it cannot be effected, or where the drawee is a fictitious person, or where it has been waived expressly or by implication. (Sec. 46 ; Cairns' Trs., 1836, 14 S. 999 ; Alhusen, 1870, 8 M. 600 ; and other cases cited by Thorburn, p. 112.) A bill accepted generally does not require presentment for payment in order to render the acceptor liable. (Sec. 52.) Dishonour by non-payment likewise gives immediate recourse against drawer and indorser. (Sec. 47.) To preserve his recourse the holder must, in case of dishonour, whether by non-acceptance or non-payment, give notice thereof to the drawer and each indorser. (Sec. 48.)

1580. [*Notice of Dishonour* must be given by the holder or indorser, who, at the time, is liable under the bill. It then enures to the benefit of all subsequent holders and prior indorsers who have recourse against the party to whom it is given. It may be made in writing or by personal communication, and it is enough if it be given in terms sufficient to identify the bill and intimate the fact of dishonour. Its return to the drawer or indorser is sufficient notice of dishonour. The

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[notice must be given within a reasonable time. Where the parties reside in the same place, the notice must reach the party to whom it is given the day after dishonour. Where they reside in different places, the notice must be sent off the day after dishonour, or by the next convenient post thereafter. If duly addressed and posted, the notice is deemed to have been given, notwithstanding any miscarriage by the post office. (See 49.)

1581. [Delay in giving notice of dishonour is excusable on like grounds to delay in presentment, and is dispensed with where, after reasonable diligence, it has failed to reach the drawer or indorser, or by waiver express or implied. (See cases on waiver collected in Thorburn, p. 121.) It is dispensed with as regards the drawer in particular cases, namely—(1) where drawer and drawee are the same person ; (2) where the drawee is a fictitious person, or a person not having capacity to contract ; (3) where the drawer is the person to whom the bill is presented for payment ; (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill ; (5) where the drawer has countermanded payment. As regards the indorser—(1) where the drawee is a fictitious or incapable person, and this was known to the indorser when he indorsed the bill ; (2) where the indorser is the person to whom the bill is presented for payment ; (3) where it was accepted or made for his accommodation. (Sec. 50.)]

1582. *Protest*.—The object of protest is to establish, by a semi-judicial procedure, the fact of the acceptor's failure to accept or to pay the bill. It is performed with us by a notary public, who, before two witnesses, marks the bill with his initials, the date, and his charge. This proceeding, which is called "noting," is proved by an instrument afterwards written on stamped paper. Protest is in Scotland the sole foundation of summary execution ; and in other countries, when performed in the form and by the officers which the law requires, it is the

proper ground of the claim or action of recourse. (Bell's Com. i. 413 ; Bell's Prin. 338.)

1583. [In the case of an inland bill, noting is not necessary to preserve the holder's recourse against the drawers and indorsers, or to found summary diligence, though, if thought fit, noting in such cases may be made. In that of a foreign bill dishonoured by non-acceptance or non-payment, it must be duly protested in order to preserve such recourse. Where a bill is noted or protested, it must be noted on the day of its dishonour. This does not, however, affect the former rule in Scotland, that a bill may be protested any time within six months of its dishonour in order to warrant summary diligence. (Secs. 51, 98 ; Bon, 1846, 12 D. 1310.)

1584. [*Liabilities of Parties.* — "In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee." But a drawee in Scotland is not liable to summary diligence until he accepts. (Watt's Trs., 1853, 16 D. 279.) The theory of bills is founded on the existence of a debt due to the drawer by the drawee, which the latter, by acceptance, acknowledges, or by a refusal to accept, repudiates, and the drawing of the bill is equivalent to an assignation of that debt by the drawer to the payee in the bill which is completed by presentment. In suing, therefore, on a bill dishonoured by non-acceptance, the holder founds on the debt due by the drawee to the drawer and the assignation thereof to him constituted by the bill. In the case of a bill accepted and dishonoured by non-payment, the holder sues on the obligation of acceptor or indorser on the bill itself. The law of Scotland differs from that of England, where no liability is incurred by the drawee until he has accepted the bill. (Sec. 53 ; Thorburn, p. 126.)

1585. [The acceptor of a bill, by accepting it, becomes liable

[to pay it according to the tenor of his acceptance. As against a holder in due course he cannot plead that the drawer is a fictitious or incapable person, or that his signature is not genuine. (Sec. 54.) The drawer of a bill, by drawing it, becomes liable that it shall be accepted when presented and paid when due, and that if dishonoured he will, on the requisite proceedings being taken, compensate the holder or any indorser who has paid it. He cannot plead that the payee was a fictitious person, or that he had no capacity to indorse. An indorser undergoes similar liability towards a holder and all subsequent indorsers. He cannot plead against the holder the unguineness of the signature of the drawee or any previous indorser. Against a subsequent indorser he cannot plead that, at the time of his own indorsement, the bill was not a good bill, or that his title to it was defective. (Sec. 55.)

1586. [Any person signing a bill otherwise than as drawer or acceptor incurs to a holder in due course the liabilities of an indorser. This will be the case should he (not being the drawee) sign in the place meant for the acceptor's signature. (Sec. 56.)

1587. [Where a bill has been dishonoured, the order of liability on it is as follows:—The holder may recover from any one whose signature is on the bill; the drawer, who has paid, may recover from the acceptor; and an indorser from the drawer, the acceptor or a prior indorser. If the bill is payable on demand, interest (*i.e.* at five per cent.) runs from the time of presentment for payment; in any other case from maturity. In the case of a bill dishonoured abroad, the holder is entitled to recover the amount of the re-exchange, with interest until the time of payment. (Sec. 57; Thorburn, p. 135.)

1588. [The holder of a bill payable to bearer, who negotiates without indorsement, is called a "transferor by delivery." He incurs no liability under it, but he warrants to his immediate transferee, who is a holder for value, that the bill is what it

[purports to be ; that he has a right to transfer it ; and that, at the time of transfer, he is not aware of any fact which renders it valueless. (Sec. 58.)

1589. [*Discharge of Bills*.—"A bill is discharged by payment in due course by or on behalf of the drawer or acceptor ;" that is, payment to the holder at or after maturity. (Sec. 59.) A bill is also discharged (1) by *confusion*, where the acceptor becomes the holder after maturity. (Sec. 61.) (2) By *renunciation*, where the holder, at or after maturity, renounces his rights against the acceptor. (Sec. 62.) (3.) By *cancellation* by the holder or his agent on the bill itself. (Sec. 63.) For other means by which bills may become discharged, see Thorburn, p. 138.)

1590. [*Alterations*.—"Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers." Alterations are deemed material which are of the date, sum, time, or place of payment, or the addition to a general acceptance of a place of payment without the acceptor's consent. (Sec. 64.) For other alterations which have been held material before the Act, see Fleming, 1823, 2 S. 446 ; M'Ara, ib. 360 ; M'Ewan, 12 S. 110 ; Knill v. Williams, 10 East, 431.]

1591. *Acceptance and Payment for Honour*.—To prevent the return of a bill, and the accumulation of expense, a friend or agent of the party or parties to a bill may accept it for their honour, *supra protest*. The person so accepting is liable to all the parties, *except those for whose honour he has accepted*. Such acceptance must be under protest before a notary and witnesses, and the instrument stating the fact must be sent, without delay, to the person for whose honour the bill is accepted. In this case the bill ought to be first protested and then accepted ; and the same course ought to be followed where

the bill is paid for honour. (Bell's Com. 401; Bell's Prin. 322.)

1592. [Acceptance for honour must be written on the bill and signed. If it do not state for whose honour it is, it is deemed to be for that of the drawer. Before such a bill is presented for payment to the acceptor for honour it must have been presented and protested for non-payment, and he must have had notice of these facts. (Secs. 65, 67.)

1593. [Payment for honour of a bill protested for non-payment must be attested by a notarial "act of honour," which may be appended to the bill. Payment for honour discharges all parties subsequent to the party for whose honour the payment has been made, but the payer for honour comes in place of the holder in relation to the party for whose honour he pays, and all parties liable to him. If the holder refuse to receive payment *supra* protest, he loses his recourse against any party who would have been discharged by the payment. (Sec. 68.)

1594. [*Bank Cheques*.—"A cheque is a bill of exchange drawn on a banker, payable on demand." (Sec. 73.) Coupons on colonial stock certificates are equivalent to bank cheques. (40 and 41 Vict. c. 59, sec. 7.)

1595. [A banker having in his hand funds of the drawer sufficient to meet a cheque presented to him, cannot refuse to cash it, unless he has a right of retention, or some other equally good claim to the money. (Ireland, 1880, 8 R. 215.) His obligation to pay the cheque is determined only by countermand or notice of his customer's death. (Sec. 75.)]

1596. [*Crossed Cheques*.—As cheques, more particularly when made payable to the bearer, or order on demand, afforded facilities for crime, the system of crossed cheques was introduced by the mercantile usage of England, and is now regulated by statute. [Several statutes were passed for the regulation of crossed cheques which were all repealed and their provisions consolidated by the Crossed Cheques Act of 1876, which is in

[turn now repealed and its provisions substantially re-enacted by the present Bills Act. (Secs. 76-82.) The provisions as to crossed cheques apply also to dividend warrants. (Sec. 95.)

1597. [Cheques may be crossed either generally or specially. Two parallel transverse lines simply with the words "and company," or any abbreviation thereof between them, either with or without the words "not negotiable," constitutes a general crossing. The addition of the name of a banker to a general crossing constitutes a special crossing; but it is not necessary in crossing a cheque specially to draw the two transverse lines, provided the name be written on the face of the cheque. (Thorburn, p. 184.) The crossing is a material part of the cheque, and cannot be obliterated or altered by any person except as authorized by the Act.

1598. [A cheque, issued uncrossed by the drawer, may be crossed generally or specially—and if already crossed generally, it may be crossed specially—by the holder, who may also add "not negotiable." A banker, to whom a cheque is crossed specially, may again cross it specially to another banker for collection. He may also cross an uncrossed cheque, or one crossed generally, specially to himself. (Sec. 77.) But cheques crossed specially more than once, except when crossed to an agent for collection, shall be refused payment. (Sec. 79.)

1599. [A banker paying a cheque in disregard of the crossing, is liable to the true owner for any loss which he may thereby have sustained. But where the crossing is faint, or has been obliterated or illegally altered so as not to be readily preceptible when presented to him, the banker paying in good faith and without negligence, otherwise than as directed by the crossing, is exempt from liability. (Sec. 79.)

1600. [A banker, on whom a crossed cheque is drawn, and who in good faith and without negligence pays it as directed by the crossing, and, if the cheque has come into the hands of the payee, the drawer, are respectively in the same position as if it had been paid to the true owner. (Sec. 80.)

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1601. [A person taking a crossed cheque marked not negotiable cannot give a better title to it than the person from whom he took it. (Sec. 81.)

1602. [A banker who in good faith and without negligence receives payment of a cheque crossed generally or specially to himself for a customer who has no title or a defective title thereto, does not incur liability to the true owner by reason merely of having received payment. (Sec. 82; Clydesdale Bank, 1876, 3 R. 586.)]

1603. *Promissory Notes*, though the simplest of all in form, came last into use as negotiable instruments. Here the debtor, who is called the maker of the note, promises within a certain time, on a specified day, or on demand, to pay to the creditor named in the note a certain sum. (Bell's Com. 387; Bell's Prin. 307.) Thus :—

£100.

Edinburgh, March 1, 1884.

I promise to pay on demand (or at some other period) to A. B. or order, within my house (or elsewhere), the sum of one hundred pounds sterling for value. (Signed) C. D.

1604. [The definition of the Act is—"A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer." It cannot be drawn for less than 20s. (8 and 9 Vict. c. 38, sec. 16.) A bank note is a promissory note issued by a banker payable to bearer on demand. An I.O.U. is not a promissory note. For examples of what have been held to be, or not to be, promissory notes, see Thorburn, p. 190 *et seq.* A promissory note is incomplete, and can found no obligation until delivered to the payee or bearer. (Sec. 84.) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and

[severally, according to its tenor. In Scotland, a note signed by two or more obligants implies both a joint and a several liability—each obligant being liable for the whole amount (Ersk. iii. 3. 74 ; Bell's Prin. 61), while in England it would imply a joint liability merely—each being liable only for his own proportion of the debt. This section would appear to sanction either practice as each country may interpret for itself, and to compel no alteration in either law. But the Act expressly says that where the note runs, "*I promise to pay,*" signed by two or more persons, it is to be deemed the joint and several note of the signatories. (Sec. 85.)

1605. [Promissory notes may be indorsed. An indorsed note payable on demand must be presented for payment within a reasonable time, or the indorsee is discharged. (Sec. 86.) A note made payable at a particular place must be presented for payment there to render the maker liable. In any other case presentment is not necessary. But it is always necessary in order to render the indorser liable. (Sec. 87.)

1606. [The maker of a promissory note engages to pay it according to its tenor ; he cannot plead that the payee is a fictitious or incapable person. (Sec. 88.) The provisions of the Act relating to bills of exchange are declared to apply with the necessary modifications to promissory notes. The maker of note corresponds to the acceptor of a bill, and the first indorser with the drawer of an accepted bill payable to drawer's order. Protest of a foreign note dishonoured is unnecessary. (Sec. 89.)

1607. [*Non-business days* are (a) Sunday, Good Friday, Christmas day ; (b) a statutory bank holiday ; (c) a public fast or thanksgiving day appointed as such by Royal proclamation. (Sec. 92.)

1608. [*When Noting equivalent to Protest.*—"Where a bill or note is required to be protested within a specified time, or before some further proceeding is taken, it is sufficient that the bill has

[been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting.]

1609. [Where a notary cannot be obtained to protest a dishonoured bill, any householder or "substantial resident," with two witnesses, may give a certificate of dishonour, which is equivalent to a formal protest. It is a question whether such a certificate could found summary diligence. (Thorburn, p. 207.)

1610. [*Bankruptcy*.—The Act does not affect the existing rules in bankruptcy relating to bills and notes. (Sec. 97; Thorburn, 209.)]

1611. *Stamp*.—All bills and promissory notes are liable to stamp duty; and, besides the penalty of nullity for breach of the Act, it is declared that it shall not be in the power of the commissioners afterwards to supply the defect. Neither will the consent of parties suffice.

1612. [The provisions of the Stamp Act of 1870 (34 and 35 Vict. c. 97) are left unaffected by the Bills Act. By that Act] inland bills payable on demand, and all drafts, orders, and cheques on bankers, are now liable to a duty of one penny.

1613. Inland bills and promissory notes payable otherwise than to bearer on demand, and foreign bills, drafts, and orders, pay a rateable duty, which is now regulated by the Sched. to 23 Vict. c. 15; and unless they are impressed with the proper stamp, they possess none of the privileges of such instruments.

1614. The stamp on foreign bills applies only to bills made in Great Britain. If drawn abroad, they are not liable to the British stamp laws, and our courts will not enforce those of foreign countries. But if such bills are negotiated in Britain, they are liable to the British stamp duties, which must be affixed before negotiation, a peculiar stamp being provided for the purpose.

1615. [*Summary Diligence*.—One of the peculiar privileges which bills and notes have long enjoyed by the law of Scotland, is that of founding summary diligence against those liable under

[them, registration of the protest of a bill in the Books of Council and Session, or in those of the appropriate Sheriff Court, being equivalent to a judicial decree. The former law of Scotland on this head is specially reserved by the Act. (Sec. 98.) The protest must be registered within six months from the date of the bill in the case of non-acceptance, and in the case of non-payment within six months from the date of payment. (Bell's Prin. 344 ; see Bon, 1850, 12 D. 1310.) The diligence may proceed at the instance of any holder of a bill whose title appears on the face of it, and does not require any extrinsic evidence to set it up. (Fraser, 1853, 15 D. 756, Lord Ivory.) It proceeds on a notarial protest for dishonour by non-acceptance or non-payment. It is not competent on a bill vitiated or altered on a material point—as the date or term of payment (Hamilton, 1825, 4 S. 102 ; Corrie, ib. 228), or where the party has signed by a mark (Cockburn, December 8, 1815, F. C. ; Kennedy, May 25, 1816, ib.), or by initials only (Munro, Hume, 81), nor where the drawee has accepted conditionally. Such bills will, however, found an ordinary action. (Thorburn, pp. 215, 216.)

1616. [Section 10 of the Mercantile Law Amendment Act, which allowed an undated bill to be proved by parole, also provided that summary diligence could not proceed on such a bill. The present Act has repealed that section, while re-enacting the first part of it, but not the concluding proviso ; so that it would now appear to be an open question whether an undated bill will found summary diligence. If the creditor raise an ordinary action, he cannot use summary diligence while it is pendent. (Denovan, 1845, 7 D. 378.)

1617. [*Parole Evidence*.—"In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence." This is an extension of proof by parole to cases in which it would not

[formerly have been admissible. The change, however, is declared not to affect the existing rules as to consignment or caution, which may be required from a debtor on a bill who desires a sist of diligence or a suspension of a charge. Nor does it apply to any bill which has undergone the sexennial prescription. (Sec. 100.)]

1618. *Prescription*.—It is a good defence against the holder of a bill, that he has not adopted measures to enforce payment within six years from the term acceptance was refused, or at which payment was due,—that is to say, the last day of grace where there is such allowance. (12 Geo. III. c. 72, made perpetual by 23 Geo. III. c. 18, sec. 55 ; Bell's Prin. 349 and 594. See Patrick, March 8, 1859, 21 D. 637.)

1619. Bank notes are exempted from [the sexennial] prescription. (12 Geo. III. c. 72, sec. 39.)

1620. The prescription of bills differs from other prescriptions in this, that it is not interrupted by a marking of partial payment or of payment of interest within the six years. (Bell's Com. 395 ; Thomson, 639 ; Ferguson v. Bethune, March 7, 1811.) See Prescription.

1621. [The prescription does not, however, extinguish the debt, which may, after the period has elapsed, be referred, both as regards constitution and resting-owing, to the debtor's oath, or be proved by writ subsequent to the lapse of the prescriptive period. (Thorburn, 221-5.)]

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## CHAPTER IX.

### PARTNERSHIP.

1622. The contract of partnership has its origin in the knowledge, on the part of individuals, that the resources, mental

and material, which they severally possess, can be employed with greater profit in combination than separately. By the community, on the other hand, this contract is regulated and protected from the knowledge that it is positively indispensable to the prosecution of all extensive, costly, and hazardous undertakings not directly upheld by the State. The aversion to State interference, peculiar to Englishmen, has led them to bestow special attention on every form of joint enterprise amongst private persons; and in Great Britain and America, the law of partnership, and more particularly of joint-stock companies, has, in its details, been worked out with greater care than either in ancient Rome (see Lord Chancellor Brougham in *Thomson v. Campbell's Trustees*, Feb. 14, 1831, W. and S. vol. v. p. 25) or in modern Continental States.<sup>1</sup> But it may be doubted whether we have now anything in principle so good as the *Société en Commandite* of the French and our own earlier law. (*Stair*, i. 16. 1; *Ersk.* iii. 3. 18; *Bell's Prin.* 350; *Bell's Com.* ii. 611.)

1623. The subject divides itself into two branches: partnership, including joint adventure; and joint-stock companies, private and public.

1624. PARTNERSHIP PROPER.—The invariable characteristics of partnership proper are—1. The voluntary association of two or more persons for the acquisition of gain. 2. A contribution by each partner of a share of money, goods, credit, skill, industry, or other means available for the common purpose. 3. Interest on the part of each partner in the profits of the concern. 4. A power in each partner to bind the company in the line of its trade. A guarantee to third parties of all the engagements undertaken in the social name, to the full extent of the individual means of each partner. (*Ersk.* iii. 3. 18; *Bell's Prin.* 351;

<sup>1</sup> As to the advantage of the Continental law of joint-stock companies, see *Joint-Stock Companies*.

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Bell's Com. ii. 621.) A right to share profits is of the essence of partnership; a liability for a share of loss without any chance of profit may be a valid contract, but is not partnership. It is further requisite that the share should be of profits as such; a share of the gross returns of an undertaking is no proof of partnership. (Clark on Partnership, i. 46 *et seq.*)

1625. *Avowed and Anonymous Partnership.*—The first is carried on and known by a firm or partnership name; the latter is managed ostensibly by one individual, who is the representative of secret or dormant partners. In the latter case, as in the former, all the partners are liable for the engagements of the company. It will constitute liability on the part of an individual if he allows his name to be used on bills of parcels or invoices, or to remain over the door. But if he has taken the precautions to prevent its use, commonly adopted by merchants, he will be freed from liability, though he has not taken any judicial step for that purpose. (Bell's Com. ii. 622; Bell's Prin. 359.)

1626. *General or Special Partnership.*—Whatever may be the private agreement between the partners, they will all be held, with regard to strangers, as partners in the general trade unless positive notice is given to the contrary. The whole stock of the company is vested in the partners in trust: first, for payment of the company's creditors; and, second, for division among the partners according to their respective shares. (Bell's Com. 613; Crooks, 1779, M. 14596.)

1627. *Implied Mandate.*—Whatever may be the nature of the private contract, each partner is presumed to hold a mandate to bind the society by bill or mercantile document; and even a fraud committed in the line of trade will be binding, to the effect of rendering the company liable in reparation of the consequences. (Bell's Com. ii. 615; Bell's Prin. 354 and 355; Menzies, 410; Wallace v. Campbell, June 23, 1824, House of Lords, 2 Shaw's Ap. Cases, 467; Blair Iron Co., August 13,

1855, 18 D. 49 (House of Lords Rep.); *Willet v. Chambers*, Cowp. 814.) But the mandate does not extend to actings which are clearly beyond the usual course of the partnership business, such as referring a company matter to arbitration, or one partner consenting to a judgment in an action against himself and a co-partner. (Ersk. iii. 3. 20; M'Laren's Bell's Com. p. 506.) [The mandate, however, entitles one partner in raising an action for recovery of a debt due to the firm to use his copartner's name in the summons without the latter's authority; that is to say, the implied mandate to uplift and discharge debts extends to the institution of actions (*Autermany Coal Co.*, 1866, 4 M. 1017); and it has been held in an Outer House judgment that the title to sue of the partner so suing is not affected by another member of the firm putting in a disclaimer. (*Kinnes*, 1882, 9 R. 698.)]

1628. In written contracts there is generally a limitation of the power of signing the firm. But whatever effect that limitation may have amongst the partners, it has no effect in saving the company or the partners from responsibility to third parties ignorant of its existence. (Bell's Com. ii. 615. See *Galway*, 10 East, 264.) A letter written and signed by one of the partners of a company in the firm's name is holograph of the firm. (*Nisbet*, 1869, 7 M. 1097.)

1629. *Joint Responsibility*.—The company must be called in the first instance, and the debt constituted against it; it being only in the event of its failing to pay that the partners as individuals can be called on. The partners, as private persons, are thus guarantees for the company, not proper or principal debtors; yet a decree against, or bill by, a company, is a warrant for summary diligence against any partner. (See *Taylor* on difference between English and Scotch Law of Contracts, p. 142.) The responsibility of the partners in relation to each other is regulated by their contract, express or implied. (Ersk. iii. 3. 24; Bell's Com. ii. 619; Bell's Prin. 356 and 371; Thomson,

July 2, 1812, F. C. ; *McTavish v. Lady Saltoun*, Feb. 3, 1821, F. C. ; *Dewar v. Munnoch*, Feb. 23, 1821, 9 S. 487.)

1630. [It would appear to be the law of Scotland that when a going business is transferred to a new partnership, the new partners, in the absence of stipulation to the contrary, do not incur liability for prior trade debts. (*Nelmes and Co.*, 1883, 10 R. 974.)]

1631. A private mercantile firm may hold a lease, but it cannot hold feudally as a vassal. (*Bell's Com.* 619 ; *Bell's Prin.* 357 ; *Menzies*, 46 and 416 ; *Denistoun and Co.*, Feb. 16, 1808, F. C. See *Minto v. Kirkpatrick*, May 1833, 11 S. 632 ; *Irvine*, July 15, 1851, 13 D. 1367.)

1632. From the trust reposed by the partners in each other, a *delectus personæ* is implied, and it is therefore held that no new partner can be adopted without the consent of those already in the firm. Hence heirs, assignees, and creditors are excluded, unless it be otherwise stipulated or necessarily implied, as, for example, from the long duration of the company. (*Stair*, i. 16. 5 ; *Ersk.* iii. 3. 22 ; *Bell's Prin.* 358 ; *Bell's Com.* 620 ; *Warner v. Cunningham*, Jan. 24, 1798, M. 14603, affirmed 3 Dow, 76 ; *Royal Bank v. Fairholme*, Feb. 14, 1770, F. C.)

1633. Even where the parties have stipulated that their heirs or assignees shall be adopted in their stead, it would appear that the partners of a private company might object, on cause shown, to the partner proposed, and that the power of assigning or selling is qualified to that extent. (*Bell's Com.* ii. 620.)

1634. *Constitution of the Contract.*—Partnership being constituted by consent, its existence may be proved by any means which the law of Scotland admits as proof of consent. It may thus be established either—1. By a regularly tested instrument ; or 2. A less formal writing, *e.g.* letters exchanged, minutes, articles subscribed by initials and afterwards acted upon, articles written in a ledger or other trade book ; 3. By express verbal agreement ; or 4. By facts and circumstances which may

be proved by the parole evidence of the servants or customers of the company ; [as by occupying a common office and employing joint clerks (Morrison, 1879, 6 R. 1158);] Bell's Com. 621 and 622 ; Bell's Prin. 361 ; Logie, 1697, M. 14566 ; Fairholms, 1725, M. 14558 ; Livingstone, 1775, M. 14551 ; Learmonth and Co., July 2, 1820, 1 Sh. Ap. Ca. 481 ; Bland, Jan. 11, 1825, 3 S. 419).

1635. The fact that a party receives payment, allowance, or wages proportioned to the profits, or divides the profits by sub-contracts with one of the partners, is not proof of partnership. The advance of money to a person engaged in trade, on a contract that the interest shall be proportioned to the profits realized, or for receipt of a share of the profits as remuneration by the servant or agent of such person, or by way of annuity by the widow or child of a deceased partner, or by a retired trader as the price of the goodwill of the business, does not constitute the person receiving it a partner. But in the event of the bankruptcy of the trader, the claims of these persons are postponed to those of the general creditors. (Guthrie's Bell's Prin. 363, 364 ; 28 and 29 Vict. c. 86.)

1636. Where the respective shares of the partners are left doubtful in the contract, the presumption is for equality of rights and responsibility. But this is a presumption not of law but of fact, which may therefore be overcome by evidence, or by indications of a different rule having been agreed to. The question, what division would be fairly proportioned to the contributions of the parties, will in this case be sent to a jury. (Ersk. iii. 3. 19 ; Bell's Prin. 362 ; *M'Whirter v. Guthrie*, Feb. 14, 1822, 1 S. 319 ; *Struthers v. Barr*, May 19, 1826, 2 W. S. 153 ; *Campbell's Trustees v. Thomson*, May 26, 1829, 7 S. 650, reversed Feb. 14, 1831, 5 W. S. 16.)

1637. One person cannot make a partnership, even though he should trade under the designation of a firm, but he may be a member of several partnerships ; and one company may be a

partner of another company. In this case the creditors of the united company are preferable on the stock of that company to the creditors of the company entering it as partners. (Bell's Com. 625 ; Bell's Prin. 365 ; Nairn v. Forbes and Co., Nov. 25, 1795 ; Bertram, Gardner, and Co., Feb. 25, 1795 ; Notes 1 and 2, Bell's Com. p. 625 ; Royal Bank of Scotland v. Assignees of Stein, Smith, and Co., Jan. 20, 1813, F. C. ; Rose, Feb. 1, 1833, 11 S. 344.) Several persons may trade under a single name ; and the same set of partners may form several distinct companies. (M'Laren's Bell's Com. ii. 515 ; Drew, 1865, 3 M. 384.)

1638. It may be stipulated that a partner is to share in the profits without sharing in the loss ; a provision which, of course, will affect only the relations of the partners amongst themselves, and will not exempt the individual so favoured from the claims of the creditors of the company. (Ersk. iii. 3. 19 ; Bell's Com. 646 ; Geddes v. Wallace, July 24, 1820, 2 Bligh's Ap. 270 ; Venables v. Wood, March 8, 1839, 1 D. 659.) A partner is not entitled to conduct a business which gives him an interest adverse to that of the partnership. (Collyer, p. 100.)

1639. *Duties of Partners.*—A partner is bound to give his personal attention and services in the company's affairs without recompense, unless it be otherwise stipulated, and this even in winding them up after dissolution. (Stair, i. 16. 7 ; Ersk. iii. 3. 21 ; Bell's Prin. 370 ; Beath, March 3, 1826, 2 W. S. 25 ; Duncan, Feb. 8, 1831, 9 S. 398.) He is bound to obey such calls as may be necessary to meet the losses and exigencies of the company. (Douglas, Heron, and Co. v. Hair, January 24, 1773, M. 14605.)

1640. *Duration and Dissolution.*—The duration of the contract may be fixed either expressly or by implication. Where such is the case, it can be prematurely dissolved only on cause shown, or by a majority, though even then, if opposed by the minority, the majority must prove that their grounds are rational and fair. (Ersk. iii. 3. 26 ; Bell's Com. 631 ; Bell's Prin. 366 and 372 ; Montgomery v. Forrester and Co., June 17, 1791, M.

14583; Barr, May 18, 1802, M. 14583; Marshall, Jan. 20, 1815, and Feb. 23, 1816, F. C.)

1641. If no term be fixed, it will endure till dissolved at the will of the parties. Any partner may dissolve the company; but, in doing so, a fair and equitable discretion must be observed, as no one will be allowed to dissolve simply to gratify his own feelings, or promote his interests to the prejudice of the other partners. (Ersk. iii. 3. 26; Bell's Com. 631 and 632; Bell's Prin. 378. See above cases, and *Peacock v. Peacock*, 16 Ves. Jun. 49; Lord Chancellor Eldon's remarks, *Featherstonehaugh v. Fenwick*, 17 Ves. Jun. 298.) Expiration of the term fixed does not dissolve the partnership, but only entitles the partners to withdraw without further warning.

1642. It has been fixed, both here and in England, that the withdrawal of one partner dissolves the concern, and that the other partners cannot proceed with the contract, even if they should be willing to do so. This is in accordance with the rule of the civil law, "*dissociamur renunciatio*ne." The contract may be renewed by tacit consent, but not to the effect of binding the partners to a renewal of the original term, but only for an indefinite period to be terminated at pleasure. (Bell's Com. 631, and cases cited.)

1643. Notice of an intention to dissolve is not held to be necessary, as the reason for the step may be a suspicion that some of the partners intend to abuse their power, and notice would increase the risk. But if the dissolution has been effected from unfair or interested motives, or if the partner dissolving has needlessly occasioned loss to the firm, he will be liable in damages. (Ersk. iii. 3. 26. See cases of *Featherstonehaugh* and *Marshall*, *ante*.)

1644. The Court, on dissolution, will, if necessary, appoint a neutral person to wind up the affairs. (Dixon, Dec. 22, 1831, 10 S. 178, affirmed Aug. 13, 1832, 6 W. S. 229; *Drysdale*, March 11, 1842, 4 D. 1061; Bell, March 11, 1857, 19 D. 704.)

1645. *Death*.—Partnership is dissolved by the death of a partner, even although a definite term of duration not yet expired has been fixed. Special stipulation alone can obviate this consequence. (Stair, i. 16. 5; Ersk. iii. 3. 25; Bell's Com. ii. 634; Bell's Prin. 375; Aiton, 1769, M. 14573, revd. Paton, ii. 283.) Where one of two partners has died after dissolution by agreement, but before the winding up is completed, the survivor may sue for debts due to the firm in his own name as sole surviving partner, the same as if the dissolution had been operated by his partner's death. (Nicoll, 1877, 5 R. 137.)

1646. *Insolvency and Bankruptcy*.—Insolvency of a partner alone does not dissolve the concern, but sequestration, by which his whole rights are transferred to his creditors, does; and the same effect will follow from a private trust-deed in favour of creditors. (Ersk. iii. 3. 26; Bell's Com. ii. 634; Bell's Prin. 377; Menzies, 417; Paterson v. Grant, July 12, 1749, M. 14578; Monro, June 8, 1813, F. C.)

1647. *Incapacity and Misconduct*.—Total incapacity, as from insanity, more particularly if likely to be permanent, and misconduct, if of such a kind as is likely to prove ruinous to all concerned,—as, for example, where the partner of a gunpowder manufactory has contracted uncontrollable habits of intoxication,—will clearly furnish the other partners with grounds of dissolution. The minor shades of incapacity and misconduct raise points of infinite difficulty. The nearest approximation to a rule, says Mr. Bell, is, that “a remedy and relief will be given only where the circumstances amount to a total and important failure in those essential points on which the success of the partnership depends.” (Bell's Com. ii. 635; Bell's Prin. 376; Sayer v. Bennet, 1784; Waters v. Taylor, 2 Ves. and Beames, 303, Lord Eldon's remarks; Pollock, Dec. 10, 1811, F. C.)

1648. *Marriage of a Female Partner* has [both in Scotland and] in England been held to form a ground of dissolution. (Young, 1852, 14 D. 540; affirmed 1 Macq. 385; Russell, 1874,

2 R. 93 ; Bell's Prin. 374 ; Com. ii. 634 ; *Nievot v. Brunaud*, 4 Russ. 247.)

1649. *Change of Partners*.—A partnership is not necessarily dissolved by the adoption of new or the dropping out of old partners, if the change be made of consent, or by virtue of a provision for that purpose in the contract. By sec. 7 of the Mercantile Law Amendment Act (19 and 20 Vict. c. 60), it is provided that no guarantee, security, cautionary obligation, representation, or assurance, granted to or for a company or firm consisting of two or more persons, or to or for a single person trading under the name of a firm, shall be binding on the granter in respect of anything done or omitted to be done, after a change shall have taken place in any one or more of the partners of the company or firm to which the same has been granted, or of the company or firm for which the same has been granted ; unless the intention of the parties that such obligation should continue binding notwithstanding any such change shall appear, either by express stipulation or by necessary implication from the nature of the firm or otherwise.

1650. *Dissolution in relation to Third Parties*.—No dissolution, whether by agreement, death, or bankruptcy, will discharge any one of the partners or his representatives from responsibility already incurred to third parties. Even where the retiring partner has paid to the rest as much as will meet the whole debts, it will not act as a discharge of his liability. (Bell's Prin. sec. 381 ; Bell's Com. ii. 638 ; *Ramsay's Executors v. Grahame*, Feb. 18, 1814, F. C. ; *Milliken v. Love and Crawford*, Feb. 23, 1803, Hume, 754.)

1651. *Notice*.—To third parties notice is requisite, even where the partnership has reached its natural term ; for the public cannot be supposed to be acquainted with the terms of the contract. (Bell's Com. ii. 639 ; Bell's Prin. 383 ; *Bolton v. Mansfield*, Nov. 21, 1786, F. C. ; *Dalglish and Fleming v. Sorley*, May 24, 1791.)

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1652. In fixing what constitutes notice, it is necessary to distinguish between *customers* of the company and *strangers*.

1653. (1.) *Customers*.—Intimation in writing, traced to the possession of the customer or to the post-office, with a proper address, is generally requisite. But an obvious change of firm will be held to be notice; and so, also, the alteration of the cheques, or notes of a banking house, or of invoices, is good notice to creditors using them. (Bell's Com. ii. 640; Bell's Prin. 384; Jenkins v. Blizard, 1 Starkie, 418; Dunbar v. Remington, Wilson, and Co., March 10, 1810, F. C.; M'Iver v. Humble, 16 East, 169; Bertram v. M'Intosh, Feb. 13, 1822; Sawers, Feb. 24, 1815, F. C.; Padon, Dec. 21, 1826, 5 S. 175.)

1654. A *Gazette* notice alone, or accompanied by advertisements in newspapers, is not sufficient notice to customers. (Sawers, *ante*; Kemp v. Allan, June 17, 1824, F. C.)

1655. (2.) *Strangers*.—As it is impossible to give special notice to all the world, the form of notice last mentioned, or any other fair and public intimation, will suffice as warning to those who have had no previous dealings with the company. A *Gazette* notice alone will not be sufficient, though by statute it is good notice of bankruptcy. Neither will newspaper advertisements suffice without the *Gazette*, which is a sort of record to which merchants and tradesmen commonly refer. (Bell's Com. ii. 641; Bell's Prin. 385; Sawers, *antea*; Godfrey, 1 Esp. Cases, 371; Williams, 2 Starkie, 290; Grahame, Peake's Cases, 154; Thomson, Feb. 13, 1822, 1 S. 314.)

1656. Even in anonymous partnership, if known to any one person, publication is necessary. (Kay v. Mair (or Kay v. Pollock), Jan. 27, 1809, F. C.)

1657. *Notice of Death*.—The publication of a partner's death, in the ordinary obituary in the newspapers, is sufficient to save his representatives from further liabilities; and it has even been said that, "death being a public fact, all men are bound to know it." (Christie v. Royal Bank, April 6, 1841, Ross'

Leading Cases, iii. 671 ; *Aytoun v. Dundee Banking Company*, July 19, 1844, 6 D. 1409.)

1658. *Winding up*.—Partnership subsists with reference to past, after it is dissolved with reference to future transactions. It thus continues for the purpose of winding up, levying and paying debts, and calling on the partners to fulfil their engagements to the public and to each other. Where there is no special agreement, the surviving partners have the power of winding up and the right of action for debts due to the company. If acts beyond the proper object of winding up are attempted, or the representatives of deceased partners are not satisfied with the credit or fidelity of the survivors, or if all the partners are dead, the Court will, on the application of a proper party, either interdict those who remain, or require caution, or appoint a neutral person to wind up the concern. (Ersk. iii. 3. 27 ; Bell's Com. 637 and 643 ; Bell's Prin. 387 ; Douglas, Heron, and Co. v. Gordon, June 16, 1792, F. C. ; Douglas, Heron, and Co. v. Lowthram, July 10, 1800 ; Dixon v. Dixons, Dec. 22, 1831, affirmed Aug. 13, 1832, 10 S. 178, 6 W. and S. Ap. 229 ; Cheyne, Nov. 26, 1828, 7 S. 60 ; Thom, Nov. 23, 1850, 13 D. 134 ; Barclay, Feb. 19, 1857, 19 D. 488.)

1659. If the company, during its subsistence as such, have ordered goods, which are delivered to the partners entrusted with the duty of winding up after dissolution, all the partners are liable for the price. (Bell's Com. ii. 637.)

1660. *Rules of Accounting*.—The moment of dissolution is the moment of division of profit and loss, where that is practicable ; and any partner may insist on a sale as the best criterion of the value of the property. The goodwill of the business forms part of the common stock. (Ersk. iii. 3. 27 ; Bell's Com. ii. 645 ; Bell's Prin. 390 ; Marshall v. Marshall, Feb. 23, 1816, F. C. ; M'Cormack v. M'Cubbin, July 4, 1822, F. C.)

1661. The debts being paid, each partner is allowed whatever he has advanced to the partnership, and charged with what he

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has failed to bring in, or has drawn out, beyond his just proportion; and the residue is then divided in accordance with the terms of the agreement, or equally if there be no express agreement. (Bell's Com. 645; *Anderson Blair v. Russel*, May 22, 1828, 6 S. and D. 836.)

1662. Where the retirement of partners is contemplated, it is common to stipulate that their interests shall be regulated by the preceding balance, and to provide that the books shall be balanced at regular intervals. In practice this is often neglected or found to be impracticable, and questions of great difficulty arise in consequence. If the company have neglected to make a regular balance, the stipulation in question will not entitle either party to go back, perhaps for years, to what may actually have been the preceding balance. In such a case the Court of Session will order a balance to be struck as at the preceding term. (Bell's Com. ii. 647; Bell's Prin. 390; *Blair v. Douglas*, Feb. 15, 1776, F. C., affirmed April 15, 1777, M. 14577; *Monro v. Cowan and Co.*, June 8, 1813, F. C.; *Buchanan v. Muirhead and others*, June 17, 1800.)

1663. *Diligence against a Bankrupt Company.*—The creditors of a company may proceed against the common stock by all the diligence of the law; and also against the separate estates and persons of the partners, as guarantees bound each for the whole amount of the company's debts. (Bell's Com. ii. 619 and 661; Bell's Prin. 371; *Thomson v. Liddell and Co.*, July 2, 1812, F. C.)

1664. There are two modes of extricating the affairs of a bankrupt company:—Trust-deed and Sequestration.

1665. There is nothing peculiar in these proceedings which does not obviously arise out of the difference between a company and an individual, and reference is therefore made to the article on Bankruptcy.

1666. Where the partners of a company are bankrupt as well as the company itself, claims may be entered by the company's

creditors both against the estate of the company and against the separate estates of the partners. To the estate of the company they have a right, to the entire exclusion of the separate creditors of the partners. These claims, both as to voting and ranking, are for their whole debts, undiminished by any right of claiming on the separate estates of the partners. (Sec. 61 and 66 of Bankrupt Act; Kinnear on Bankrupt Act, 2nd ed., p. 78.)

1667. The trustee for the creditors of the company is entitled to be ranked in full on the estate of a partner, for debts due to the company, like an ordinary creditor.

1668. *Joint Trade*, or joint adventure, is a partnership limited to one particular voyage, adventure, or speculation. It may be entered into either by individuals or companies, or by individuals with companies, or companies with companies. To the extent to which it reaches, it differs not from partnership at common law. There is no responsibility beyond the limited agreement of the parties, but to this extent all the partners are responsible *singuli in solidum* for the engagements of the active partners. (Ersk. iii. 3. 29; Bell's Com. ii. 649; Bell's Prin. 392.)

1669. *Joint Ownership* is not even a limited partnership, for there is here no agreement to share the profit and loss. It generally occurs where a purchase is made by several with a view to ultimate division, where a ship is the property of several *pro indiviso* proprietors, or where a succession has opened to several persons in common. (Bell's Com. ii. 655; Bell's Prin. 393. See Logan, May 15, 1824, 3 S. 15.)

1670. **JOINT-STOCK COMPANIES.**—The leading distinction, independent of statute, between a joint-stock company and a proper partnership, consists in the shares of the former being transferable to purchasers, heirs, or creditors, without the consent of the remaining shareholders; whereas, in partnership, the adoption of a new partner is either forbidden or allowed only

with the consent of the whole members of the existing firm. The ground of this distinction is, that the affairs of a joint-stock company, being managed not by the partners as such, but by directors whom they select, there is no necessity for their reserving to themselves a choice of persons. The success of the enterprise, and the safety of the shareholders as a body, do not demand intelligence, industry, or even probity on the part of each of them. Money is all that they are called upon to contribute, and the money of one man is as good as that of another. All the shareholders, it is true, have an interest in the selection of prudent directors, and consequently in the character of the body by which they are selected; but this interest is not sufficient to warrant them in incurring the loss which they would certainly sustain by preventing the unrestricted sale of their shares. (Ersk. iii. 3. 28; Bell's Com. ii. 627; Prin. 397 *et seq.*)

1671. There is another very important distinction which, under certain regulations and restrictions, is now admitted by statute, but which the common law of Scotland, following that of France,<sup>1</sup> and indeed of continental Europe generally, is believed at one time to have recognised, viz. that the shareholders in joint-stock companies should not be responsible beyond the amount of their shares. "The very meaning of confining the trade to a joint-stock," it was said in the case of the Arran Fishing Company, "is that each should be liable for what he subscribes and no farther" (see Report of Stevenson v. M'Nair, from F. C., in Morrison's Dict. pp. 14560 and 14667. See also Bell's Com., Shaw's edition, vol. i. p. 239, and Story on Partnership, sec. 165, p. 270, where the above case is quoted

<sup>1</sup> In the *Société en Commandite*, a distinction is made between the directors or managers of the company and the shareholders; the former incurring an unlimited, the latter a limited responsibility; an arrangement which offers, perhaps, the best solution of a very difficult question. —*Code de Commerce*, liv. i. tit. iii. secs. 23–28.

as fixing the law of Scotland ! ) ; and the equitable principle on which the decision was founded was, that in dealing with such companies the public ought to rely on the stock actually subscribed, and not on the uncertain solvency or credit of the individual partners. Had this principle been steadily adhered to, the public would have become aware that, apart from positive stipulation, they had no guarantee beyond the stock, and false confidence and imprudent speculation would have been discouraged more effectually, and in a manner far more in accordance with our free institutions, than by such directly preventive measures as the "Bubble Act" (Geo. 1. c. 19, 1719).

1672. But though the object which has now been imperfectly attained by legislation was thus within the reach of the common law of Scotland, the principle on which it depended was not followed out. In the well-known case of the Douglas Bank (Douglas, Heron, and Co. v. Hair, July 24, 1778, M. 14605), all the partners were held to be responsible as individuals, notwithstanding that the bank, though trading under the personal firm of Douglas, Heron, and Co., could not possibly be viewed as a partnership proper. The whole subject was thus again thrown loose, and the consequence was the introduction of the English doctrines, first by implication and latterly by express enactment.

1673. By 19 and 20 Vict. c. 47, sec. 61, it is provided that the existing shareholders shall be liable to contribute to the assets of the company to an amount sufficient to pay the debts of the company, and costs, charges, and expenses of winding up, *unless the company is limited under the statute* ; in which case no contribution shall be required from any shareholder exceeding the amount, if any, unpaid in the shares held by him.

1674. The provision (sec. 2) that this Act shall not apply to persons associated for the purpose of banking or insurance, though repealed in other respects by 20 and 21 Vict. c. 49, sec. 3, was retained to the effect of excluding banking companies from the privilege of being registered as limited. But this

restriction has since been removed by 21 and 22 Vict. c. 91 (2nd August 1858), and joint-stock banks may now be formed on the principle of limited liability. The only special condition attached to the privilege in their case is, that the shareholders shall be subject to unlimited liability in respect of notes issued in the United Kingdom.

1675. Insurance companies were, previous to 1862, by 7 and 8 Vict. c. 110, excluded from the privilege of forming themselves on the principle of limited liability, but this Act was repealed by the Act of that year. Registration under the latter Act is compulsory on insurance companies which were registered under the Act of 7 and 8 Vict.

1676. The present position of shareholders at common law is thus the reverse of what it was held to be in the case above mentioned; and, in place of being free from liability beyond their shares unless specially bound, they are liable to the full extent of the debts of the concern, unless exempted either by a special Act of Parliament, as in the case of the Bank of Scotland, or by availing themselves of the provisions of the recent Joint-Stock Companies Acts.

1677. *Royal Charter*.—"It has sometimes been doubted," says Mr. Bell (Com. vol. i. p. 240, Shaw's ed.), "whether this privilege can be granted by royal charter; but the Crown may create fraternities or companies for trade, and limited responsibility is not a privilege inconsistent with the common law, or with the rights of other subjects."

1678. It is believed, however, that in point of fact none of the chartered banks do possess this privilege. In the charters of the Commercial and National Banks it is expressly declared that the liability shall continue to be unlimited; whilst the charter of the Royal Bank is silent on the point. Such charters, however, unquestionably confer the ordinary privileges of municipal and other incorporations, and banks possessing them are capable of holding heritable property, suing and being sued,

granting and receiving money, etc., by their corporate names, and through their office-bearers, without mention of the individual shareholders. They are, in short, distinct legal individuals.

1679. Formerly the power of the Crown to grant letters patent was confined to twenty years; but by 19 Vict. c. 3, it is enacted that it shall be lawful to grant them to any company of more than six persons in Scotland, who were carrying on the business of banking before 9th August 1843, either for a term of years or in perpetuity.

1680. Since the passing of 7 Geo. iv. c. 67, even private joint-stock banking companies have possessed the privilege of suing and being sued in the name of their manager or other principal officer, on condition of giving up to the Stamp Office, now the Joint-Stock Companies Registry Office (established by 7 and 8 Vict. c. 110, sec. 19), annual returns, which must be corrected during the year, of the name of the firm, and of the names of the individual members and manager.

1681. *Joint-Stock Companies Acts*.—The regulating statute on joint-stock companies is now "The Companies Act, 1862" (25 and 26 Vict. c. 89), by which the previous Acts are consolidated and amended, and seventeen of them, with the re-enactment of two sections, repealed. Its provisions, as amended and enlarged by the later Acts of 1867 (30 and 31 Vict. c. 131); [1877 (40 and 41 Vict. c. 26); 1879 (42 and 43 Vict. c. 76), and 1880 (43 Vict. c. 19),—the series to be read together as the Companies Acts, 1862 to 1880],—extend to all companies formed and registered under the previous Acts. For a list of the previous Acts still in force, see M'Laren's *Bell's Com.* ii. 517.

1682. A prospectus of the proposed company is usually issued, containing a statement of the purposes, capital, and prospects of the company. This document must express fairly and candidly, not only the true financial position, but also the prospects of the company; but although this is the case, it will be allowed to be reasonably sanguine as to the future. If the prospectus is not of

this truthful character, any one who has taken shares on the faith of it may repudiate the purchase, if he does so promptly, or, if he has paid for the shares, may recover the price, provided he can restore the shares, or may have an action against the promoters. So also he will be free, if the memorandum of association differ from the agreement, but not in a question with creditors, unless he had his name removed from the register prior to the winding up. (Guthrie's Bell's Prin. 403 B.) The discrepancy between the prospectus and the articles of agreement must, however, be essential; mere high colouring or grandiloquence will not free partners from liability on the plea of misrepresentation. (City of Edinburgh Brewery Co., 1869, 7 M. 891.)

1683. All companies instituted since 1862 *may*, if consisting of seven or more members, and *must*, if consisting of more than ten members and engaged in the business of banking, or of more than twenty if engaged in any *other* business having for its object the acquisition of gain, be formed subject to the provisions of the Act of 1862 with limited or unlimited liability.

1684. Companies are divided by the Act (of 1862) into three classes: (1) Companies limited by shares; (2) Companies limited by guarantee; and (3) Companies with unlimited liability. (Guthrie's Bell's Prin. 403 C.)

1685. The memorandum must contain the name of the company, the place of business, the object of the trade, the amount of capital, the number of shares, and the liability of the shareholders, whether limited or unlimited. If the liability of the company is to be limited by shares, the memorandum must state this, and also the amount of capital divided into shares of a fixed amount; and if the company is limited by guarantee, there is a declaration that in the event of the company coming to be wound up, each member will contribute towards payment of its debts, whatever may be necessary, but not exceeding a specified amount. (Ib.)

1686. The memorandum and the articles of association, if any, shall be delivered to the Registrar of Joint-Stock Companies (sec. 17), and, when registered, shall bind the company and shareholders to the same extent as if each had subscribed his name or affixed his seal to it. (Sec. 11.)

1687. The memorandum may, where the company is limited by shares, and where it is limited by guarantee or unlimited, *must*, be accompanied by articles of association, prescribing the regulations of the company, and these, when registered, shall be binding on the shareholders; but if no such regulations are prescribed, the regulations contained in a schedule annexed to the Act shall, so far as applicable, be the regulations of the company. (Secs. 14, 15.) The table annexed to the Act may from time to time be altered by the Board of Trade.

1688. The Board of Trade may appoint registrars and other officers, and determine the places at which their offices shall be established. (Sec. 174.)

1689. Upon compliance with the terms of the Act as to registration and payment of the fees, the registrar certifies that the company is incorporated, and in the case of a limited company that it is limited; and the subscribers of the memorandum, and such others as afterwards may become shareholders, are a body corporate by the name prescribed in the memorandum, having perpetual succession, a common seal, and power to hold lands. (Sec. 18.) But "no company formed for the purpose of promoting art, science, religion, charity, or any other like object not involving the acquisition of gain by the company or by the individual members thereof, shall, without the sanction of the Board of Trade, hold more than two acres of land;" but the Board may grant them licence to hold such quantity as they think fit. (Sec. 21.) A certificate of incorporation by the registrar is evidence that the requisitions of the Act have been complied with.

1690. Modifications on the memorandum, or on the regulations contained in the articles of association, may be made for the

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purpose of increase of capital, issue of new shares, division of capital into shares of larger amount, or conversion of shares into stock, or change of name, but only by special resolution as defined by the Act. (Secs. 12, 13, 50, 51.)

1691. *Register*.—Every company shall keep a list of the names and occupations of the members, of the shares held by each, of the amount paid by each on his shares, and of the date at which each became or ceased to be a shareholder. (Sec. 25.) Companies limited by shares must make up an annual list of their members, and containing other particulars enumerated in the Act. This list must be entered in a separate part of the register, and a copy transmitted to the registrar. (Sec. 26.) Notice of increase of capital or of membership must also be sent to the registrar. (Sec. 34.) The register is *prima facie* evidence of anything directed to be inserted therein. (Sec. 37.)

1692. The register shall be kept at the office of the company, and shall be open during business hours to the inspection of any shareholder, gratis, or of any other person on payment of one shilling; and a copy of the whole or part of the register may be required on payment of sixpence for every hundred words. (Sec. 32.)

1693. *Transfer of Shares*.—Companies registered under the previous Acts may transfer their shares in the manner hitherto in use, or in such other manner as the company may direct, and those formed under the Act of 1862 as provided by the company's regulations. (Secs. 178, 22.) Shares are to be moveable estate. The transfer must be executed by both transferor and transferee, but the transferor remains holder of the share until the name of the transferee is entered in the register. (Table A, 8.)

1694. [On the shareholder's right to transfer, Mr. Buckley gathers from English decisions certain broad rules—(1) "A shareholder may, although the company is in difficulty, or even *in extremis*, effect a transfer of his shares, and such a transfer

[will be valid although made avowedly for the purpose of avoiding liability, although made to a man of straw, although made for a nominal consideration, or although a valuable consideration be expressed but be not in fact paid, or even although the consideration be in fact paid *to*, not *by*, the transferee, provided the transaction be *bona fide* an absolute out and out disposal of the property, without any trust or reservation for the benefit of the transferor ;” (2) But the transfer is invalid if it be colourable and fictitious, and the transfer merely nominal with any trust or reservation of benefit in favour of the transferor ; or (3) If it be not open and *bona fide*, but “made with colour, indicating an attempt to escape liability in a manner tainted with fraud, or be made upon an opportunity fraudulently obtained.” (Companies Acts, p. 23 *et seq.*, with full discussion of authorities.)]

1695. *Meetings*.—An ordinary general meeting of the company shall be held once at the least in every year. (Sec. 49.) Every company must hold a meeting within four months after registration of its memorandum. (30 and 31 Vict. c. 131, sec. 39.)

1696. The directors may, when they think fit, and they shall, upon a requisition in writing by any number of shareholders holding not less than one-fifth part of the shares of the company, convene an extraordinary general meeting. (Table A, 32.)

1697. *Quorum*.—A quorum shall be ascertained thus:—If the whole shareholders do not exceed ten, five shall be a quorum ; if they exceed ten, there shall be added one for every additional five up to fifty, and one for every ten after fifty, with this limitation, that no quorum shall exceed twenty. No business, except the declaration of a dividend, shall be transacted at any meeting unless a quorum of the shareholders be present at the commencement of the business. (Table A, 37.)

1698. *Votes of Shareholders*.—Every shareholder shall have one vote for every share up to ten, an additional vote for every five shares beyond the first ten up to one hundred, and an additional vote for every ten shares beyond the first hundred

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shares. Insane persons and minors vote by their legal guardians. (Table A, 44, 45.)

1699. *Liability of Shareholders.*—The liability of members in registered companies begins with the registration of the company. They are not liable for the contracts of the promoters before that time unless by acquiescence. After registration members are liable for all contracts made by the directors or agents in the course of the company's business, but not as individuals, beyond the amount of their shares if not paid up, or by their guarantee. But where a company carries on business for more than six months with less than seven members, each is severally liable for the whole debts contracted during that time. The liability of promoters is a question of fact for a jury in each individual case. (Guthrie's Bell's Prin. 403 K ; sec. 48.)

1700. *Directors.*—The first directors shall be selected, and their number determined, by the subscribers of the memorandum. (Table A, 52.) Limited companies may have directors with unlimited liability. (30 and 31 Vict. c. 131, sec. 4.)

1701. The office of director shall be vacated by the acceptance of any other office or place of profit under the company, by bankruptcy or insolvency, or by being concerned in any contract with the company. (Table A, 57.)

1702. *Calls.*—The company may, from time to time, on twenty-one days' notice, make such calls on the shareholders in respect of moneys unpaid on their shares as they think fit. (Table A, 4.) Should the shares be finally forfeited for non-payment, the shareholder notwithstanding continues liable to the company for all calls owing upon his shares at the time of forfeiture. (Table A, 21.)

1703. *Dividends.*—The directors, with the sanction of the company in general meeting, may declare a dividend to be paid to the shareholders in proportion to their shares. No dividend shall be payable except out of the profits arising from the business of the company. (Table A, 72, 73.)

1704. Before recommending a dividend, the directors may set

aside a reserved fund out of the profits of the company. (Table A, 74.)

1705. *Accounts*.—A balance-sheet shall be made out in every year, and laid before the general meeting of the company, containing a summary of the property and liabilities of the company. A printed copy of such balance-sheet shall, seven days previously to such meeting, be delivered at or sent by post to the registered address of every shareholder. The accounts shall be examined and the correctness of the balance-sheet ascertained by one or more auditors, to be elected by the general meeting. They need not be shareholders, and must not be officers of the company. (Table A, 78 *et seq.*)

1706. The Board of Trade may appoint inspectors to examine into the affairs of any company: in the case of a banking company with capital divided into shares, upon the application of members holding not less than one-third of the shares; in the case of any other company, on the application of those holding not less than one-fifth, where the capital is divided into shares, and where it is not divided into shares, on that of not less than one-fifth in number. The application must be supported by evidence satisfying the Board of Trade that there is good reason therefor. It is the duty of all officers and agents of the company to produce the books, etc., under penalty, to the inspectors, who may examine them on oath. (Secs. 56-58.)

1707. A general meeting may likewise, by special resolution, appoint inspectors, whose powers as to inquiring into the affairs of the company shall be the same as if they had been appointed by the Board of Trade. (Sec. 60.)

1708. *Winding up*.—Companies registered under the Act, whether formed under it or not, may be wound up under it either by the Court, or voluntarily with or without the supervision of the Court. This extends also to all companies registered under previous Acts, and all other partnerships of more than seven members. (Guthrie's Bell's Prin. 403 M.)

1709. (1.) *Winding up by the Court.*—A company may be wound up by the Court whenever a special resolution has been passed in a general meeting requiring the company to be wound up by the Court, or if it does not commence business within a year from its incorporation, or suspends its business for a whole year, or the members are reduced to less than seven, or the company is unable to pay its debts, or finally, when the Court of Session is of opinion that it is just and equitable that it should be wound up. (Sec. 79.) Winding up by the Court proceeds on the petition of the company, or a creditor, or contributory, or by all or any of them. There can be no dispositions of the company property, and no transfer of shares except with consent of the Court, after the winding up has begun. The winding up may be stayed on the motion of a contributor or creditor, and meetings of either creditors or contributories may be formed to ascertain their wishes. The presenting of the petition for winding up has the same effect as bankruptcy. (Guthrie's *Ball's Prin.* 403 P.)

1710. *Official Liquidators.*—For the purpose of conducting the proceedings in winding up a company, and assisting the Court therein, one or more persons shall be appointed by the Court as liquidators. Where the voluntary winding up is continued under its supervision, the Court may either appoint the voluntary liquidators to be the official liquidators, or it may appoint other or additional liquidators. The liquidators have power to bring or defend actions in name of the company; to carry on its business; sell property; execute deeds; rank on the bankrupt estates of deceased contributories; make and indorse bills; take out letters of administration to a deceased contributory, and do other acts for obtaining payment from a contributory or his estate which cannot be conveniently done in the name of the company; and generally to do all things necessary for winding up its affairs and distributing its assets. (Secs. 92–95.) [The distinction between a trustee in a sequestration and the

[liquidator of a joint-stock company is, that the former holds the estate of the bankrupt on a *property* title, while the latter is merely an *administrator*. (Gray's Trs., 1881, 9 R. 225; Clark, 1882, ib. 1017.)]

1711. *Contributories*.—The Act of 1862 distinguishes as to contributories between (1) companies formed and registered under the Act, or under the repealed Acts of 1856–1858; (2) companies registered but not formed under these Acts; and (3) unregistered companies. After making the order for winding up, the Court settles a list of contributories, distinguishing between those who are so in their own right and those who are so as the representatives of others, in order to do which it may rectify the register of members. (Secs. 98, 99.) The list covers present and past members; the personal representatives, heirs, and devisees of deceased members; the assignees in bankruptcy of bankrupt members; and the husbands of female members. (Secs. 76–78.) A person who has been induced to take shares by fraud imputable to the company or its promoters, is entitled, [as long as the company is a going concern,] to repudiate his shares, and cease to be liable to contribute, as against the company, provided the shares have been acquired directly from the company and not in the market, and have been repudiated with due diligence. But as against the creditors of the company, [after it has become insolvent and has taken distinct steps towards liquidation,] he is liable to be placed on the list of contributories, if it be proved that they would otherwise remain unpaid. (Oakes v. Turquand, 1856, L. R. 2 H. L. 325; [Alexander Mitchell, 1879, 6 R. H. L. 60; Tennent, ib. 69.] A person in such position has no action of damages against the company. (Houldsworth, 1880, 7 R. H. L. 53.)) Where the company is unlimited, or where the full amount of the shares is not paid up, each member or his representatives is liable to contribute to the amount required for winding up the company. But no past member is liable who has ceased to be a member for one year prior to the winding up;

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or in respect of any debt contracted after he ceased to be a member; or unless the existing members are unable to satisfy the contributions required; or, in a limited company, beyond the amount unpaid on his shares; or, in the case of a company limited by guarantee, beyond the amount undertaken on his behalf in the memorandum. (Sec. 38; Guthrie's Bell's Prin. 403 R.)

1712. [*Trustees, Executors, etc.*—Trustees whose names are on the register, though entered as such, are personally liable. (Lumsden v. Buchanan, 1865, 3 M. H. L. 89, 4 Macq. 950; Muir, 1878, 5 R. 392, aff. H. L. ib. 21.) So also is a *curator bonis*. (Lumsden v. Peddie, 1866, 5 M. 34.) A trustee will be liable even if he have not himself signed the transfer, provided he have acquiesced in the purchase, or otherwise by his actings adopted it. (Cunninghame, 1879, 6 R. 679, aff. H. L. ib. 99; Smith, ib. 1017; Gordon, 7 R. 55.) Resignation by a trustee after the stoppage, but before the resolution to wind up, will not relieve him of liability. (Shaw, 6 R. 332.) If a trustee have resigned before the stoppage, the fact must be intimated to the company to exempt him from liability. (Tochetti, ib. 789.) The executors of a trustee who has predeceased the liquidation are not liable, at least primarily. (Oswald, ib. 461.) Whether they might be put on the second list was not decided. Where the name of a deceased trustee is allowed to remain on the register after his death, his executors are liable to be placed on the second list, though the company was aware of his death. (Law's Exs. ib. 830.)

1713. [An executor whose testator held shares in a joint-stock company does not, by merely accepting office, incur liability as a contributor in respect of such shares. To do so he must voluntarily have the shares transferred into his own name, and he is to be allowed a reasonable time to decide whether he will do so or not. (Buchan, 1879, 6 R. H. L. 44.)

1714. [Trustees or executors whose names have not been entered in the register until after the declared insolvency of the

[company are not primarily liable; but the Court will order their names to be entered in the subsidiary list. (Macdonald, 6 R. 621; Myles, *ib.* 718; Stenhouse, 7 R. 102.) But where the person whose name was on the register at the time of the stoppage had sold his shares some time before, and the purchaser's name was entered after the stoppage, the Court refused to remove the latter's name, because the seller was entitled to have it substituted for his own. (Howe, 6 R. 1194.)

1715. [*Wives and Husbands*.—A wife who has purchased shares with money from which her husband's *jus mariti* and right of administration are excluded,—her name only being put on the register,—is liable to contribute to the extent of her separate estate; but her husband is not liable. (Biggart, 1879, 6 R. 470.) But in like case, where the husband's rights are not excluded, and though only the wife's name appears on the register, and she alone signs the dividend warrants and herself draws the dividends, the husband is liable. (Thomas, *ib.* 607.) This will be the case even where the entry in the register bears that the shares are exclusive of his rights, where it is shown that they were bought with the husband's money, or that his rights are not in reality excluded. (Steedman, 7 R. 111; Carmichael, *ib.* 118.) Where a wife, whose husband's rights are excluded in a marriage contract, though only in general terms, succeeds to shares of which she is registered as owner, her name only is to be put on the list of contributories. (M'Dougall, 6 R. 1089.)]

1716. *Dissolution*.—When the affairs of the company have been completely wound up, the Court shall make an order declaring the company dissolved from the date of the order.

1717. (2.) *Voluntary Winding up*.—A company may be wound up voluntarily, *1st*, if the period fixed for its duration has expired, or on the occurrence of any event which it has been agreed should involve a dissolution of the company; *2nd*, whenever the company has passed a special resolution to that effect;

3rd, whenever the company has passed an extraordinary resolution that they are satisfied that it cannot continue its business by reason of its liabilities, and that it is advisable to wind it up. The winding up commences at the date of the resolution authorizing it, after which business can only be carried on for the purpose of winding up. The company in general meeting appoints its own liquidators, who shall have the same powers as those appointed by the Court. Any creditor of the company may insist on the company's being wound up by the Court if they are of opinion that his rights are being prejudiced. (Secs. 129-146.) When a voluntary winding up has begun, the Court may direct that it shall continue subject to its supervision (Secs. 147, 148.) In a voluntary winding up, the liquidators appointed by the company have the same powers as to settling the list of contributories as belong to the official liquidator in winding up by the Court. (Sec. 133.)

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## CHAPTER X.

### OF CAUTIONARY OBLIGATIONS.

1718. A cautionary obligation is a secondary engagement, by which he who enters into it binds himself, failing the principal obligant, to fulfil the primary obligation. (Stair, i. 17. 3; Ersk. iii. 3. 61; Bell's Com. i. 347; Bell's Prin. 245.)

1719. Previous to the passing of the Mercantile Law Amendment Act (19 and 20 Vict. c. 60), it was customary to distinguish between proper and improper cautionry. *Caution proper* was where the cautioner was bound avowedly as such; *improper cautionry* was where both cautioner and principal were bound as principals. According to the present law, cautionry proper can exist only as the result of positive stipulation, under the proviso attached to the 8th section of the

statute above referred to, which enacts that "nothing herein contained shall prevent any cautioner from stipulating, in the instrument of caution, that the creditor shall be bound, before proceeding against him, to discuss and do diligence against the principal debtor."

1720. Cautionary obligations are generally undertaken from motives of friendship, and are consequently gratuitous; but it is not uncommon for them to be entered into in consideration of a premium paid. (Bell's Prin. 246. See King, 1711, M. 9461.)

1721. The existence of a consideration has always been optional in Scotland; and the rule of our law in this particular has been adopted into that of England by 19 and 20 Vict. c. 97, sec. 3. (Bell's Com., Shaw's edition, vol. i. p. 268, note.)

1722. Where a premium is stipulated, the contract becomes an insurance of solvency or honesty; and associations have been formed, both here and in England, for the purpose of undertaking as a speculation to guarantee the good conduct of parties employed as public or private officers. (See Guarantee Association.)

1723. The tendency of the decisions in the Courts, both here and in England, of recent years, has been to require greater strictness than formerly in the constitution of cautionary obligations; and latterly the Legislature itself has stepped in with the same object.

1724. By the Mercantile Law Amendment Act (1856) (19 and 20 Vict. c. 60, sec. 6), it is enacted that all cautionary obligations, and all representations and assurances, shall be in writing, and shall be subscribed by the person undertaking or making them, or by some person duly authorized by him, otherwise the same shall have no effect. [A signature on a bill of exchange proved by parole evidence to have been intended as a guarantee, is not a cautionary obligation in terms of that section. (Walker's Tra., 1880, 7 R. H. L. 85.) Nor can a written

[cautionary obligation be qualified by parole proof. (*M'Pherson*, 1881, 9 R. 306.)]

1725. A cautionary obligation may be dependent on a condition, in which case it is not effectual unless the condition be complied with. (*Bell's Prin.* 250 ; *Culcreugh Cotton Co.*, Nov. 21, 1823, 2 S. 513 ; *Blair*, 1836, 14 S. 1069 ; *Paterson*, March 9, 1844, 6 D. 987.)

1726. The cautioner is in general entitled to plead every defence which was competent to the principal debtor ; and the extinction of the principal obligation discharges the accessory one. (*Ersk.* iii. 3. 64 ; *Bell's Prin.* 251 ; *Menzies*, 211 ; *Johnston*, 1680, M. 2076 ; *Nimmo*, 1700, M. 2076 ; *Innes*, 1728, M. 2079 ; *Halyburton*, 1735, M. 2073.) Moreover, the discharge of one cautioner, consented to by the rest, is a discharge to all. (*Mercantile Law Amendment Act*, sec. 9.)

1727. *Discussion*.—Cautioners bound prior to the *Mercantile Law Amendment Act*, 21st July 1856, are entitled to insist that the creditor shall first call on the principal debtor, and, in law language, *discuss* him ; and that, even in the case of his failing to satisfy the obligation in full, the creditor shall give him (the cautioner) the benefit of such portion of it as he did discharge. (*Stair*, i. 17. 4 ; *Ersk.* iii. 3. 61 ; *Bell's Com.* i. 347 ; *Bell's Prin.* 252.)

1728. *Discussion* imports not merely a demand for payment, but enforcement of it, to the full extent which the circumstances of the principal debtor admit of. (*Brisbane*, 1662, M. 3588.) *Discussion* will be held to have taken place if the principal debtor has left the country, leaving no effects behind him, or has become bankrupt. (*Bell's Prin.* 253 ; *Elams*, Dec. 7, 1757, M. 2110.)

1729. Cautioners bound subsequent to the date of the *Mercantile Law Amendment Act* have no right of discussion (sec. 8) unless expressly stipulated for.

1730. The cautioner is entitled to an assignation of the debt

and diligence, and on satisfying the creditor comes into his place, and may proceed as principal creditor. (Ersk. iii. 3. 68 ; Bell's Com. i. 348 ; Bell's Prin. 255 ; Lesly, 1665, M. 2111 ; Erskine v. Manderson, Jan. 14, 1780, M. 1386 ; Lowe v. Greg, Feb. 17, 1825, 3. S. 543 ; Stewart v. Bell, May 31, 1814, F. C.)

1731. He may also take legal measures for his relief against the possible consequences of the failing condition of the principal debtor. (Ersk. iii. 3. 65 ; Bell's Prin. 255 ; Thomson, Jan. 19, 1627, M. 2113 ; Kinloch v. M'Intosh, June 13, 1822, 1 S. and B. 419 ; Simpson, Feb. 23, 1826, 4. S. 492 ; Gilmour, Dec. 11, 1832, 11 S. 193.)

1732. The cautioner possesses a lien over any debt, which he owes to the principal debtor, and may retain it for his relief. (Bell's Com. ii. 123 ; Bell's Prin. 1454 ; Town of Aberdeen, 1709, M. 2570 ; Brough, 1793, M. 2585.)

1733. *Co-Cautioners* are entitled to mutual relief, whether their obligation be embodied in one or in several deeds. (Ersk. iii. 3. 68 ; Bell's Prin. 271 ; Walker, March 3, 1830, 4 W. S. 40 ; Clarke, July 7, 1830, 8 S. 1025 ; Low, Feb. 8, 1831, 9 S. 411.)

1734. Where a co-cautioner seeks relief against the others, he must communicate the benefit of any deduction or ease which may have been allowed him in paying the debt, and also in the general case, of any security which he may hold over the estate of the principal. (Ersk. iii. 3. 70 ; Bell's Com. i. 349 ; Bell's Prin. 270 ; Nicol v. Doig, June 16, 1807 ; Lawrie v. Stewart, June 6, 1823, 2 S. 368 ; Coventry v. Hutcheson, June 16, 1830, 8 S. 924.)

1735. *Division*.—Although co-cautioners are each ultimately liable for the whole debt, they are liable only for their several proportions so long as the others are solvent, provided they have not expressly renounced that benefit. (Ersk. iii. 3. 63 ; Bell's Prin. 267 ; Drummond, Feb. 3, 1697, M. 12339 ; Smollet, Feb.

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21, 1793, M. 12354.) The law of division does not seem to be affected by the Mercantile Law Amendment Act; and it will therefore still be necessary, where there are more cautioners than one, not bound jointly and severally, that all should be proceeded against.

1736. If the creditor, without the cautioner's consent, discharge the principal debtor, or any one cautioner, it is a discharge to the other cautioners also, provided they be bound jointly and severally for the whole debt, and not where one cautioner is discharged only for his own proportion of the debt (Guthrie's Bell's Prin. 259; Church of Eng. Ass. Co., 1857, 19 D. 1079; Morgan, 1872, 10 Macph. 610); and the same is the case if he accept a composition, thereby altering the cautioner's security and increasing his risk. But where there has been sequestration under the Bankrupt statutes, no act of the creditor in voting, drawing a dividend, or consenting to a discharge on composition, shall have the effect of discharging the cautioner; but the cautioner may obtain an assignation, and take his place in the sequestration if he chooses. (Bell's Prin. 261, note.) Cautioners for a firm are not bound after any change of the firm, unless by express stipulation, or by necessary implication, it appear that he is bound notwithstanding the change. (19 and 20 Vict. c. 60, secs. 7 and 9.)

1737. The neglect by the creditor of measures proper or necessary for the common interest, will furnish the cautioner with a defence against liability. In this way he may be freed by the creditor's abandonment of diligence. (Ersk. iii. 3. 66; Bell's Com. i. 361; Bell's Prin. 263; M'Millan, Jan. 21, 1629, M. 3390; Anderson, May 25, 1811, F. C.; Wallace, Jan. 13, 1825, 3 S. 304; Buchanan v. Douglas, Feb. 3, 1853, 15 D. 365, affirmed March 16, 1855, 18 D. 11.)

1738. But, on the other hand, the cautioners are bound to look to the condition of the debtor. Even without paying up the debt, which is always in their power, they may make use of

inhibition, adjudication, or arrestment of the debtor's effects in security, and thus protect themselves against the consequences of his impending insolvency. (See sec. 1697.)

1739. The cautioner is not freed by the creditor merely forbearing to enforce payment, unless he agreed to "give time" to the debtor in the technical sense,—that is to say, beyond the limits of the original obligation,—and by virtue of that agreement tie up the cautioner from the remedy he might otherwise have had. (Bell's Prin. 262; *Alexander v. Gordon*, Dec. 6, 1671, M. 3089; *Hume*, Jan. 12, 1830, 8 S. and D. 295; *Macartney v. Mackenzie*, June 4, 1830, reversed Sept. 23, 1831, 8 Sh. 862, 5 W. and S. App. 504; *Mactaggart's Representatives v. Watson*, Jan. 24, 1834, reversed April 16, 1835, 12 Sh. 332, 1 Sh. and MacL. App. 553; *Creighton v. Rankin*, Feb. 6, 1838, affirmed May 26, 1840, 16 S. 447, 1 Rob. App. 99; *Morison v. Balfour*, Feb. 16, 1849, 11 D. 653; *Richardson v. Hardy*, March 29, 1853, 15 D. 628; *Forsyth*, Feb. 8, 1859, 21 D. 449.)

1740. *Prescription*.—Cautionary obligations prescribe in seven years (*ante*, p. 289), by stat. 1695, c. 5. In order to have the benefit of the Act, the cautioner must appear in the bond expressly as cautioner; or, if he appear as co-obligant, it is necessary that, at the time of settling the transaction, the principal debtor's obligation to relieve his co-obligant should be intimated to the creditor. (Ersk. iii. 7. 22–24; Bell's Com. i. 356; Bell's Prin. 600; *Ross v. Craigie*, Dec. 11, 1729, M. 11014; *Douglas, Heron, and Co. v. Riddoch*, Nov. 20, 1792, M. 11032; *Yuille v. Scott*, Nov. 27, 1827, 6 S. 137; *Monteith v. Pattison*, Dec. 3, 1841, 4 D. 161.)

1741. This notice must be notarial or judicial; mere private knowledge, unless acknowledged in writing by the creditor, not being sufficient. (*Bell v. Herdman*, Feb. 14, 1727, M. 11039; *M'Ranken v. Shaw*, Feb. 24, 1714, M. 11034. See *Drysdale v. Johnston*, Jan. 25, 1839, 1 D. 409.)

1742. *Exceptions.*—Cautioners *ad facta præstanda* have not the benefit of the Act (*Robertson v. M'Kinlay*, Dec. 3, 1736, M. 11010); nor judicial cautioners (*Hope v. Fowles*, Feb. 4, 1715, M. 11009; *Kerr v. Bremner*, March 5, 1839, 1 D. 618); nor cautioners in marriage-contracts (*Stewart v. Campbell*, July 1726, M. 11010); or for the discharge of an office (*Strang v. Fleet*, Jan. 5, 1709, M. 11005); or in a bond of relief (*Bruce v. Stein*, June 26, 1793, M. 11033); or for the payment of a composition on Bankruptcy. (Bell's Com. i. 358; *Cuthbertson v. Lyon*, May 23, 1823, 2 S. D. 330.) To this enumeration may be added the case in which the term of payment is beyond the seven years from the date of the bond; that in which a collateral obligation separate from the principal's is undertaken (*Wilson v. Tait*, July 21, 1840, *Robertson's Appeal Cases*, i. 137), and where a letter of guarantee is granted in a mercantile transaction. (Ib.) As a general rule, the statute will not be extended to a state of matters not expressly provided for. "Upon principle and authority," said Lord Chancellor Cottenham, "the statute is to be strictly construed, and its provisions not extended beyond the cases specified. . . . There is no room for the administration of any equity under the statute." (*Wilson v. Tait*, *ut supra*.)

1743. *Cautioners for a Cash Credit.*—In all mercantile communities, bankers and capitalists have been in the habit of advancing money to merchants and manufacturers on the security of their friends, and thus enabling them to extend their transactions beyond the limits of their own capital. But there is a peculiar form of credit which the Scottish banks from the first have been in use to grant, which, in point of convenience at least, possesses advantages over the bill transactions which supply its place in other countries, and by which it is believed that the trade of Scotland has been greatly advanced.

1744. "A cash credit of this description," says Professor Bell (Com. i. 367), "is an undertaking on the part of a bank to

advance to an individual, or to a partnership, on security, such sums of money as may from time to time be required, not exceeding on the whole a certain definite amount, to be repaid, and a continual circulation kept up by the replacing in the bank of funds as they come in." "Whoever has a credit of this kind," says Adam Smith, "and borrows a thousand pounds upon it, for example, may repay this sum piecemeal, by twenty and thirty pounds at a time, the company discounting a proportionable part of the interest of the great sum from the day on which each of these small sums is paid in, till the whole be in this manner repaid." It is the latter feature of the transaction, the constant reduction of the liability of the trader on each repayment, that is peculiar to Scottish banking.<sup>1</sup>

1745. The practice of the banks is to permit the person having this species of floating transaction occasionally to exceed, to a certain limited extent, the amount of his credit; the bank, of course, in this case running the whole risk of the excess.

1746. The security for such a credit is a bond with cautioners, usually two in number, for repayment on demand of the sums advanced, with interest upon each issue from the day on which it is made. Interest at a lower rate than that demanded on the terms advanced is paid by the bank on the sums deposited, the difference between the two being the banker's profit.

1747. Heritable security is sometimes given, though bankers

<sup>1</sup> "Credits of this kind are, I believe, commonly granted by banks and bankers in all different parts of the world. But the easy terms upon which the Scotch banking companies accept of repayment are, so far as I know, peculiar to them, and have perhaps been the principal cause, both of the great trade of those companies, and of the benefits which the country has received from it."—*Wealth of Nations*, B. ii. c. ii. "It has since been ascertained that the amount of the notes of the Scotch banks in circulation, issued by means of cash credits, bears but a small proportion to those that are issued in the discount of bills, so that the public, and not the banks, would seem to be the chief gainers by this form of credit."—*Ib.* M'Culloch's ed. vol. ii. p. 42, note.

generally decline it on the ground that it cannot be made immediately available.

1748. The obligation, when personal, is generally undertaken by the principal and cautioners "conjunctly and severally," by which means the bond is protected from the septennial prescription, and the bank, in bonds dated prior to the Mercantile Law Amendment Act, freed from the necessity of "discussing" (*ante*, p. 392) the principal before coming on the cautioners. In all cases occurring subsequently to the passing of that Act (July 1856) the benefit of discussion is taken away. (19 and 20 Vict. c. 60, sec. 8.)

1749. On payment by the cautioners, the bank must assign to them whatever securities they hold from the principal. (See *M'Gilvray*, June 10, 1826.)

1750. *Termination of the Obligation.*—The cautioners, by simple notice to the bank, may free themselves from responsibility emerging subsequent to the date of such notice; but unless this be attended to, they and their representatives will remain indefinitely liable. (*Bell's Com.* i. 369; *Commercial Bank of Aberdeen v. Callender*, Feb. 4, 1801, *Hume*, 88; *University of Glasgow v. Miller*, Nov. 18, 1790, *M.* 2106; *Paterson v. Calder*, July 5, 1808, *M. voce* Society, Ap. No. 4; *Dudgeon v. Laing*, Dec. 1, 1813; *Hume*, 102; *Morrice v. Scott*, Feb. 19, 1831, 3 D. and A. 557. See *Wylie v. Fiddes*, Dec. 13, 1853, 16 D. 180.)

1751. *Cautioners for Agents, Officers, etc.*—Cautionary obligations are often undertaken on behalf of persons in situations where the engagements and liabilities are prospective.

1752. In order that such an engagement may be binding, it is indispensable that the nature and extent of the liability shall be fairly disclosed to the cautioner. But while the cautioner must not be exposed to the danger of any situation or transaction not in his contemplation at entering into the contract, he is not entitled to withdraw without giving due notice, and allowing reasonable time for a new arrangement. (*Bell's Prin.* 287 *et*

*seq.*; Bell's Com. i. 367; Smith, remitted from House of Lords, 1829, 7 S. 244.)

1753. It will depend on the expressions used in the bond whether its effect is to be retrospective as well as prospective; but the *presumption* will always be that it is prospective merely, and very clear words will be necessary to make the cautioner liable for past dealings. (Bell's Prin. 289; Bell's Com. i. 366; Kinnear, 1776, 3 B. Sup. 102; Mags. of Edinburgh, 1766, Hailes, 109; Smith, *antea*; Dykes, June 3, 1825, 4 S. 70.)

1754. The creditor is bound to exercise a certain vigilance; and he is not at liberty to sanction any departure from the terms of the contract, or from the fair line of employment, or any material change in the arrangements which may prejudice the cautioner, without disclosing it. (Bell's Prin. 288; Allan *v.* Paterson, June 17, 1633, M. 2088; Scott *v.* Campbell, Feb. 14, 1834, 12 S. and D. 447; More's Notes on Stair, 109; Bonar *v.* Macdonald, July 16, 1847, 9 D. 1537, affirmed Aug. 9, 1850, Bell's App. vii. 379.)

1755. A cautioner has thus been freed from responsibility for a factor on an estate where the creditor neglected to insist for an annual settlement of accounts, which was stipulated for as a condition of the engagement; and many similar instances have occurred. But mere neglect, unless very gross, or partaking of a fraudulent character, will not relieve the cautioner. (Bell's Com., Shaw's ed. i. 289; Leith Banking Co. *v.* Bell, May 12, 1830, affirmed Oct. 1, 1831, 8 S. 721, and 5 W. and S. Ap. 703; Thistle Friendly Society *v.* Gardyne, June 17, 1834, 12 S. 746; Duncan *v.* Porterfield, Dec. 13, 1826, 5 S. 111; Forbes *v.* Welsh, June 10, 1829, 7 S. 732; Pringle *v.* Tate, Nov. 17, 1832, 11 S. 47; M'Tagart *v.* Watson, April 16, 1835, 12 S. 332, 1 S. and M'L. 553; Falconer, March 8, 1843, 5 D. 866; Biggar, Nov. 19, 1846, 9 D. 78.)

1756. The principal object of the associations already men-

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tioned (sec. 1712) is to guarantee the integrity of managers, clerks, collectors, receivers, and the like.

1757. As regards Government servants, it is enacted by sec. 55 of the British Guarantee Association Act (17 and 18 Vict. c. 216), that the guarantee of the Association may be taken in lieu of the security required by any statute, rule, or regulation now in force, from persons in public offices and employments. The like guarantee may be taken in lieu of security required from persons connected with the administration of the poor laws in England and Ireland (sec. 58), or from any officer of a savings bank, friendly society, law society, benefit building society, or Government annuity society (sec. 62). The Association also issues bonds for factors, tutors, and curators, in terms of sec. 27 of Pupils' Protection Act, by authority of the Court of Session; for trustees on sequestrated estates, in terms of sec. 72 of the Bankruptcy (Scotland) Act, 1856; and also for officials under Masters of Chancery in England.

1758. *Cautioners for a Messenger-at-arms* bind themselves "for the damage, interest, and expenses which the lieges shall sustain through the negligence, fraudulent or informal execution of the messenger." Under the term "lieges" are included not merely the employers of the messenger, but all those against whom he has committed any fault in the discharge of his office as messenger, but not when acting as an agent, in which capacity messengers are sometimes employed. (Bell's Com. i. 365; Bell's Prin. 296; Grant v. Forbes, July 8, 1758, M. 2081, affd. March 7, 1759; Kennedy, Dec. 13, 1821, 1 S. 190; Cullen, Jan. 27, 1852.)

1759. The obligation, says Mr. Bell, is one "of very great responsibility, considering the infinite delicacy and the importance of the acts which a messenger has to perform" (Bell's Com. i. 365); and, on the ground that this responsibility cannot be limited to any specific sum in money, it has been refused by the Guarantee Association.

1760. *Caution for a Bank Agent*, though an obligation of great delicacy, and, unless limited to a particular sum, of great extent, is governed by the ordinary rules of cautionry already explained. (Bell's Com. i. 362; Bell's Prin. 290; *Smith v. Bank of Scotland*, H. of L., 1 Dow, 272; Thomson, Jan. 29, 1822, reversed H. of L. June 11, 1824, Shaw's Appeals, ii. 316; Leith Bank, May 12, 1820.)

1761. *Judicial Caution* is of two kinds,—for appearance, and for payment.

1762. If a creditor swears that his debtor is meditating flight (in *meditatione fugæ*), he may obtain a warrant for his apprehension; and on the intention to fly being proved, he may compel him to find caution that he will abide the judgment of a court (*judicio sisti*). (Bell's Com. i. 380; Bell's Prin. 273.)

1763. The ordinary form of the bond of caution for this purpose is, that the debtor shall appear and answer to an action for the debt, if brought against him within six months.

1764. The second kind of judicial caution is by bond of presentation, and is granted when a creditor is about to execute personal diligence, or has already done so, and grants an indulgence, on the cautioner binding himself that the debtor shall be forthcoming at an appointed time, otherwise he himself will pay the debt. The object of the cautioner's interposition is to protect the debtor from imprisonment, and allow him time to settle the debt. (Bell's Com. 385; Bell's Prin. 277. See Chaplin, Feb. 5, 1842, 4 D. 616.)

1765. *Caution in a Suspension* is a mode of staying the immediate execution of a decree, without endangering the ultimate rights of the party in whose favour it has been granted. (Bell's Com. i. 385; Bell's Prin. 276; Buchanan, Feb. 3, 1853, 15 D. 365.)

1766. The terms of a bond of caution in a suspension are, "that the suspender shall make payment to the charger, or to any other person to whom payment shall be ordained to be

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made, of the principal sum, etc., as contained in the decree and charge for payment, in case it shall be found by decree of the Court of Session that he ought so to do after discussing the suspension."

1767. Many judgments of the sheriffs and other inferior judges could not, until the passing of the recent Court of Session Act (31 and 32 Vict. c. 101), be brought under review except by process of advocacy, in which it was necessary for the appellant to find caution analogous to that which is still required, for the most part, in Suspensions. This Act (sec. 65) makes it competent to *appeal* all judgments which could have been *advocated* under the old law, and dispenses with caution; but it is provided (sec. 79) that the Court of review shall have power to regulate all matters relating to the interim possession pending the discussion of the appeal.

1768. *Juratory Caution*.—On a satisfactory proof of poverty being offered, an inferior judge is entitled to grant leave to suspend on what is called *juratory caution*; that is to say, on the suspender lodging in the hands of the clerk of court an inventory of his whole possessions, with a disposition in security in favour of the respondent of any heritage which may belong to him, and an assignation of his debts and other moveable rights.

1769. [The suspender who offers juratory caution is in the position of one suing *in forma pauperis*. Since, therefore, the enactment of 13 and 14 Vict. c. 36, which provides for the application by one so suing for a remit to the reporters on the *probabilis causa litigandi*, has been decided not to apply to notes of suspension (Simpson, 1852, 14 D. 990), the suspender on juratory caution must, before his caution can be accepted, satisfy the Lord Ordinary on the Bills that he has a *probabilis causa litigandi*. (M'Gregor, 1862, 24 D. 1006; Mackay's Practice, i. 184.)]

## CHAPTER XL

## OF INSURANCE.

1770. Insurance is an engagement by the insurer, in consideration of a specified sum advanced, or of a periodical payment made by the insured, called a *premium*, to indemnify him to a certain extent for such losses as may occur to his property from contingencies which are specified or understood. The arrangement forms a means of security, (1) against the dangers of the elements or of the enemy, to which ships or goods are exposed at sea; (2) against the danger of fire, to which property of all kinds is liable on land; and (3) against loss to the insurer from the death of others, or to his family or creditors from his own.

1771. There is no contract known to the law of which the benefits, in the general case, are more indisputable; for, on the one hand, the insurer, whilst he divides his loss with others, earns large profits on the average of his transactions; and, on the other hand, the insured is protected from losses which, to an individual, would involve utter ruin. It has been well remarked by our great authority in mercantile law, that "the obvious necessity of some such refuge from disaster amidst the perils of trade, and the impracticability of proceeding without this expedient, now that it is known, afford unquestionable proofs of the narrow limits of ancient commerce, in which insurance was not practised." (Bell's Com. i. 473.)

## MARINE INSURANCE.

1772. The persons who undertake risks on ships, or goods on board of them, are termed *underwriters*, from their writing their names under the policy or instrument by which they respectively become liable. The transaction is commonly effected by a middleman, or broker as he is called, whom capitalists, on

the one hand, empower to incur risks for them, and to whom the merchant or shipowner, on the other hand, applies when he wishes to insure.

1773. The broker by this means is placed in a position which enables him to complete the transactions without delay. "The broker," says Mr. Burton, "is in the situation of debtor and creditor with both parties. To the credit of the underwriter he puts down premiums, which he credits as cash, undertaking the risk of recovering them; and in periodical accounts he may balance against these, returned premiums and losses. Against the insured he debits the premium, and credits an insured loss or a return premium." (Burton's Manual, 436; and Bell's Com., Shaw's ed. i. 494.)

1774. The subject of marine insurance generally is the ship or cargo, but under this is comprehended the freight to be earned by the ship and the anticipated profits of a sale of the cargo. Advances on freight may also be insured, and so may the bottomry and *respondentia* interests which may emerge in connection with the ship or cargo. (Bell's Prin. 470.)

1775. There can be no insurance where there is no interest, though it is not necessary that it be specified in the policy (Bell's Com., Shaw's ed. i. 477); insurances, "interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the insured," being suppressed by an Act of early date. (19 Geo. II. c. 37, sec. 1.) But an insurable interest need not be a direct right of property; it may consist of an expected profit or freight, or other interest in the ship. Seamen's wages cannot be insured, because "it is one object of all maritime laws to prevent the desertion of seamen, and interest them in the preservation of the ship." (Arnould on Marine Insurance, i. 258, edition 1857.) This prohibition extends to the mate and all inferior officers, but not to the captain or master.

1776. On the principle that immoral contracts are null, no insurance will be given effect to where the contract involves a breach of law, such as the insurance of smuggled goods. (Marshall, 5 *et seq.*)

1777. The risks to which marine insurance commonly applies are those of—1st, Loss by the sea ; 2nd, by fire ; 3rd, enemies ; 4th, pirates ; 5th, arrests by kings or states ; 6th, "barratry," or fraudulent and illegal acts by the master and mariners ; 7th, jettison or *jactus*, *i.e.* the casting overboard of parts of the cargo, or of the guns, stores, etc., for the common safety. (Bell's Com., Shaw's ed. 473, 485.) Barratry does not include bad stowage, exposure to wet, theft, etc. (Bell's Com., Shaw's ed. 478.) A special clause is now frequently inserted into policies by which the underwriter takes the risk of the damages which the ship may incur by running down or injuring another vessel, to the extent of three-fourths, such risk not being covered by an ordinary policy. (Guthrie's Bell's Prin. 472, 7 a.)

1778. *Policy*.—The only legal evidence of the contract is a policy, written on stamped paper. It must specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured ; and if any of these particulars is omitted, it is null and void to all intents and purposes. The policy must be stamped at the date of its being entered into. It can be after-stamped only—(1) In the case of policies of mutual insurance, additional stamps may be impressed where they are not already underwritten to an amount beyond what the original stamps warrant ; and (2) policies entered into abroad need not be stamped unless they are to receive effect in this country, when they may be stamped within two months after they are received here. Contracts by shipowners and others undertaking risks, attending goods on board ship, or to indemnify the owner for loss, require to be stamped as policies of insurance under the existing Stamp Act. (Bell's Prin. 466.)

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1777. It is usually preceded by a *slip*, which is merely a *promise or memorandum* in which the underwriters subscribe their initials. This *slip* cannot be received as evidence in consideration of the policy. (Bell's Com. Shaw's ed. 473.) As to the effect before the policy is completed, Mr. Arnould says, "A memorandum of insurance embodying an agreement to execute a regular stamped policy, and acknowledging the receipt or accompanied by the payment of premium, may be enforced, as all events in courts of equity, or in courts possessing a mixed legal and equitable jurisdiction like the Court of Session in Scotland. In such cases, however, the memorandum is available not as in itself constituting a legal contract of insurance, but only as an agreement to execute such contract." (Arnould on Marine Insurance, p. 52; and Lord Denman, in *Mead v. Davidson*, 3 Ad. and Ell. 303.)

1780. The subject or subjects insured must be so described in the policy as to leave no doubt of their identity. The ship is described by her name and that of the master; but where there is no doubt as to the identity of the risk, a mistake in the name of the ship or captain would not be fatal to the contract; and a saving clause is usually inserted, "or by whatever other name the ship shall be called," and "or whoever else shall go as captain." Goods are identified as goods on board the particular ship or ships; but where the insurer does not yet know by what vessel the goods may be carried, they may be insured as "by ship or ships," and even goods unknown may be insured "to be afterwards declared and valued by ship or ships." (Bell's Prin. 469 and 470.)

1781. The commencement and termination of the risk must also be certain both as to time and place. The risk on the ship begins from the time mentioned in the policy, or from the date of the policy, if no time be mentioned. That on freight begins from the time of the ship being ready for her cargo, or from something being begun to be done under the contract of affreight-

ment with a view to its fulfilment; and on goods with the loading. The usual termination for the ship is, "till moored twenty-four hours in good safety;" and for the goods, "till safely landed." (Bell's Prin. 471.) On a time policy the period is by statute restricted to twelve months. (30 and 31 Vict. c. 23, sec. 8.)

1782. A policy may be either a valued policy or an open policy. In the first case a sum is fixed which is agreed to be the value of the loss; in the other case no sum is fixed, and proof must be given of the amount. (Bell's Prin. 481.)

1783. Like other instruments in *re mercatoria*, a policy of insurance does not require to be subscribed according to the statutory formalities required in the subscription of probative deeds. No witnesses are required. (Bell's Com. 5th ed. i. 606.)

1784. Parole evidence will not control the popular meaning of the words of a policy, "unless it establish a usage which, in mercantile affairs, and when not inconsistent with law, controls the construction of all policies." (Bell's Com., Shaw's ed. 474; Robertson, 4 East, 135; Hunter v. Leathby, 10 Barn. and Cress. 871.)

1785. The policy bears the receipt of the premium, and it is therefore presumed to be paid. (Bell's Com. 5th ed. 600.)

1786. Insurance being a contract of good faith, misrepresentation, false insinuation, and concealment of facts materially affecting the risk will be fatal. As an example, may be given concealment of positive information of the day of sailing. (Bell's Com. 5th ed. 619; Bell's Prin. 474; Kinloch v. Duguid, Jan. 22, 1813, F. C. 108; Hill v. Sibbald and Co., June 16, 1809, F. C. 303, reversed 2 Dow's Rep. 263; Smith, March 9, 1810, F. C.) "Contracts of insurance are in this, among other particulars, exceptional, that they require on both sides *uberrima fides*." (Lord Pres. in case of Life Ass. of Scotland, 1873, 11 M. 351.) Concealment of a fictitious sale, transferring a ship

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temporarily to a foreign flag for the purpose of avoiding a Board of Trade inspection, has been held to void an insurance. (Hutchison and Co., May 23, 1876, 3 R. 682.)

1787. *Warranty* differs from representation in this, that whereas the effect of representation depends on whether or not the fact to which it refers is material to the risk, warranty, whether material to the risk or not, is an absolute condition, which, if not true or not complied with, defeats the insurance. (Bell's Com. 5th ed. i. 616; Bell's Prin. 475; M'Moran and Co. v. Newcastle Fire Insurance Co., 1815, 3 Dow, 255.)

1788. *Express Warranties* are either mentioned in the body of the policy or in some instrument to which it refers. (Bell's Com. i. 617; Bell's Prin. 476; Bean v. Stupart, Doug. 11; Worsley v. Wood, 6 T. R. 710; Routledge v. Barrell, 1 H. Black. 254.)

1789. They have reference to the sailing or departure of the ship, to knowledge of her safety on the day of signing, and the like. (Ib. ib.) They are absolute conditions, and must be literally fulfilled.

1790. *Implied Warranties* are such as must of necessity be supposed to result from the very nature of the contract: for example, that the ship is seaworthy; that the navigation will be conducted with ordinary care and skill; that the voyage is not forbidden by public law, etc. (Bell's Com. ib.; Bell's Prin. 477; M'Kellar, November 15, 1810, F. C.; Thomson, June 3, 1826, 4 S. 670; Cook, July 18, 1843, 5 D. 1379; Baker, February 14, 1855, 17 D. 417; February 28, 1856, 18 D. 691.)

1791. *Seaworthiness* implies that the ship, rigging, and tackle are sufficient for the safe performance of the voyage, as at the commencement thereof. Seaworthiness is presumed, and it lies with the underwriters to prove the reverse. It is no defence against a charge of unseaworthiness that the ship has been carefully inspected and fully repaired. (Bell's Prin. 477.)

1792. An old treenail hole imperfectly filled up, and thereby

occasioning a leak, was held to free the underwriters. So the want of ground tackling sufficient for the ordinary perils of the sea, or of the rigging and sails necessary to enable the ship to escape from the enemy, or proceed with due expedition, are defects in seaworthiness. (*M'Kellar v. Henderson*, Nov. 15, 1810, F. C. ; *Wedderburn v. Bell*, 1807, 1 Camp. 1 ; *Wilkie v. Geddes*, Feb. 27, 1815, 3 Dow, 57.)

1793. In this, as in other warranties, it signifies nothing whether the insured was himself aware of the ship's condition or not. No ignorance or innocence on his part will be an answer to the fact that the ship was unfit for the voyage. An inadequate force in the crew, or an incapable master, is deficiency in seaworthiness. (Bell's Com. i. 617 and 618 ; Bell's Prin. 476 and 492.)

1794. *Non-alteration of the voyage* is an implied warranty ; as is also *non-deviation* ; for the risk being calculated on the regular course of a specified voyage, it is of the essence of the contract that that course shall be adhered to. (Bell's Com. i. 662 ; Bell's Prin. 492 *et seq.*)

1795. The mere intention to deviate, or an engagement to do so, or instructions to that effect of the master, will not discharge the underwriters if the ship is lost before the deviation. (Bell's Com. 622 ; Bell's Prin. 492.)

1796. If the deviation was necessary for the safety of the ship or cargo, or of a part of the cargo, it will not discharge the underwriters, provided the shortest and most expeditious course has been adopted ; nor where the change of course was to aid another ship in distress, or to join a convoy in time of war. (*Dunlop v. Allan*, Nov. 24, 1785, F. C. ; *Lavabre v. Wilson*, Doug. 290 ; *Smith*, 2 Dow, 538 ; *Delaney*, 1 T. R. 22 ; *O'Reilly v. Gonne*, 4 Camp. 249 ; *Scott v. Thompson*, 1 New Rep. C. P. 181 ; *Foster v. Christie*, 11 East, 205.)

1797. If a voyage to a given place be insured, but when the ship sails there is no intention of going to that place, she is held

not to have sailed on the voyage, though lost on the fair way of it. This is not a question of deviation, but of total abandonment of the insured voyage. But when the *termini* of the voyage contemplated are those described in the policy, the voyage is held to be the same up to the point of divergence. Total loss, therefore, before the diverging point, is covered; and in the case of partial loss, evidence will be led as to the proportion of it occurring before and after that point. (Bell's Prin. 492; Kewley, 2 Hy. Blackst. 343; Forster v. Wilmer, 2 Str. 1249; Marsden, 3 East, 572; Hare, 7 Barn. and Cress. 14.)

1798. *Total loss* does not necessarily imply the entire destruction of the subject insured. It may be only such damage as to render it comparatively valueless, or to reduce the value to less than the freight. (Bell's Com. i. 607; Bell's Prin. 480.)

1799. For purposes of insurance, a ship is totally lost where it cannot be repaired so as to proceed on the voyage at a reasonable expense, *i.e.* at an expense not exceeding the value of the ship when repaired; and, in like manner, goods are totally lost where the object of the voyage is defeated. (Allan, 8 Barn. and Cress. 561; Thomson, 1823, 3 Muir, 294; M'Iver, 4 Maule and Sel. 576; Fleming, March 5, 1846; *affd.* April 18, 1848.) Where the insurance is "on freight," there is total loss where it is put beyond the power of the insurer to earn freight.

1800. *Abandonment*.—The claim for total loss must be accompanied by abandonment where there is anything remaining or in hope. The underwriter is thus left to make the most of what may be saved. Bell's Com. i. 607; Bell's Prin. 480, 484; Marshall, i. 593; Park, 228.)

1801. *Partial Loss or Injury*.—In cases of partial loss, the insurer recovers the estimated amount of the loss or damage, which is called *average*; but by the custom of trade no loss is paid unless it amounts to a certain percentage. In London this is regulated by a notandum on the policy, which sets out that

corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded ; sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under 5 per cent.; and all other goods, also the ship and freight, are warranted free from average under 3 per cent., unless general or the ship be stranded. (Bell's Com. i. 611 and 614 ; Bell's Prin. 489 and 503 ; Park, 162 ; Stevens on Average, 158.)

1802. *Capture and Arrest by Princes* may be treated as total losses, and the ship abandoned just as in the case of shipwreck. (Bell's Prin. 472 ; Bell's Com. i. 608.)

1803. *Reinsurance*.—The interest which the underwriter has in the voyage is one which he is entitled to protect by insurance. This right, which in most of the countries of Europe is unlimited, has with us been restricted by statute (19 Geo. II. c. 37, sec. 4) to a remedy to the creditors or executors of the insurer. (Bell's Prin. 505 ; Marshall, 145.) The statute mentioned has been repealed ; so that there is now no prohibition against reinsurance. (27 and 28 Vict. c. 56, sec. 31 ; 30 and 31 Vict. c. 23, sec. 3.)

1804. *Double Insurance* is where the insured effects insurance of the same risk with more than one set of underwriters. In this case he may sue for complete indemnity on both policies, though he cannot draw it under both, for that would amount to a wager policy. There is contribution and relief among the underwriters, all the policies to that intent being regarded as one. (Bell's Prin. 506 ; Davis v. Gildart, Marsh, 148 ; Godin, 2 Burr. 489 ; Irving, 2 Mood. and Mal. 153, 2 Barn. and Ad. 193.)

1805. *Return of Premium*.—Insurance is a contract of indemnity ; hence where no risk is run the premium must be returned, premium and risk being correlatives. But if the risk have once begun there is no claim for return. Where there is no interest in the insured, or where the interest is over-insured,

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the whole or a portion of the premium is retainable; or where the contract is void from illegality; further, where an event has happened on which it was stipulated there should be a return, as sailing with convoy, arriving safe, etc. (Bell's Prin. 490; M'Laren's Bell's Com. i. p. 648.)

### FIRE INSURANCE.

1806. Fire insurance is a contract by which the insurer undertakes for a limited period, in consideration of a premium, to indemnify the insured for such injuries to his house, or other premises, goods, or stock, as may occur from accidental fire. (Bell's Com. i. 625; Bell's Prin. 508.)

1807. The premium is commonly paid in advance; and the transaction is managed, not by brokers, but by the insurer, commonly a joint-stock company, and the insured communicating directly.

1808. Policies without interest, which in marine insurance are forbidden (*ante*, p. 404) as a species of gambling, are in fire insurance most anxiously guarded against, as holding out temptations to wilful fire-raising. They might probably be challenged at common law, and they are prohibited by 14 Geo. III. c. 48. (Marshall, 790; Park, 654; Bell's Com. i. 625; Bell's Prin. 509.)

1809. But if the interest be real, it is a matter of indifference from what source it arises. A creditor who holds a security over the house or goods of his debtor, or a trustee or agent who has goods for sale on commission, have the same right to insure, up to the value of the property, as if it actually belonged to them. (Ib.)

1810. Factors, warehousemen, printers, and the like, who have goods entrusted to them of which the value fluctuates from day to day, effect a general or floating insurance, applicable to all goods that may be in their warehouse, or to the goods that

may be in all or any of their warehouses, cellars, granaries, or the like, at a certain port or in a certain city. (Bell's Prin. 517. See Donaldson, March 2, 1836, 14 S. 601 ; Dalgleish, Jan. 17, 1854, 16 D. 332.)

1811. The insured is allowed to sue on such a policy for the loss of the property of his customers, as well as his own, if he can show that by contract, or usage, or the course of dealing, he is liable for the goods. (Bell's Com., Shaw's ed. vol. i. p. 501.) He will be entitled, however, to apply the sum received to extinguish his own loss in the first instance. (Dalgleish v. Buchanan, Jan. 17, 1854.)

1812. The policy must be written on stamped paper. It stipulates that payments of premium shall be made within fifteen days from the day limited in the policy ; and that no insurance shall take place till the premium is paid. An application presented and agreed to is thus no insurance until the stipulated deposit has been made. (Bell's Com., Shaw's ed. i. 502 ; Christie v. North British Insurance Co., Feb. 10, 1825.)

1813. The same general principles as to fairness in disclosing circumstances material to the risk, which we stated under marine, apply to fire insurance.

1814. Here also a warranty is part of the contract, and if not true, destroys the insurance, even though it should not be material to the risk.

1815. Mere increase of heat, though injurious to property, will not entitle the insured to recover,—there must be ignition. (Ib. ; Austin, 4 Camp. 360, 2 Marsh, 130 ; Tarlton, 5 T. R. 695.)

1816. The policy covers all damage and injury incident to fire ; such as that caused by water used in extinguishing the fire, and even reasonable charges for removing the articles which have escaped the fire altogether. (Johnston, Nov. 25, 1828, 7 S. 53.) It has been held in England that a fire policy covers injury by the explosion of a neighbouring gunpowder magazine.

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(Bell's Prin. 510.) Buildings separated by a stone or brick gable are usually insured separately, and not *in cumulo*. But in fire insurance, though a sum less than the value of the subject be insured, and a partial loss occur, the insured recovers his whole loss, without contribution as for the value uninsured.

1817. Loss occasioned by want of occupancy of the premises destroyed, or loss of rent, is not covered by the policy, unless there be a special insurance to that effect. This point has been so decided both here (*Menzies v. North British Insurance Co.*, Feb. 13, 1847; *Wright v. Pole*, 1 Adol. and El. 621) and in England, contrary to the opinion of Mr. Bell (Bell's Com., Shaw's ed. i. 503.) The English decision was held to be of equal authority with a Scotch one, in a department in which the laws of the two countries do not differ; but the Court held their view to be strengthened by the fact, that in the Scotch case the insurance company had reserved to itself the right of reinstating the buildings in place of paying the money. The loss was thus a loss which could be repaired by building.

1818. On the occurrence of a fire, the insured is bound to give the most satisfactory proofs he can be expected to possess of the amount of injury.

1819. He must also give notice of any other insurances effected, so as to afford an opportunity to the office claimed against to call for contribution. These and other conditions are generally inserted in the printed proposals. (Bell's Com., Shaw's ed. 504; Marshall, 788.)

1820. There is no abandonment as in a total loss in marine insurance, and the settlement is always on the principle of an average loss. Option is frequently left to the insurer to pay the loss or reinstate the insured. If he select the latter, the impossibility of doing so subsequently emerging is no defence. (Guthrie's Bell's Prin. 515; Nicolson's Ersk. 739.)

1821. The loss is generally settled by arbitration,—a clause of reference being very generally inserted in policies.

1822. By 19 Vict. c. 22, all insurances effected by foreign companies in Great Britain are subjected to the same duties as if made by British companies ; and all persons who, as agents, receive proposals for insurance by companies out of the United Kingdom, are deemed to be persons keeping an office for fire insurance, and are required to take out a licence and give security for payment of duties under a penalty. (Secs. 1, 2, 3.)

## LIFE INSURANCE.

1823. Life insurance is scarcely a contract of indemnity, like sea and fire insurance ; but it may be viewed as a contract of mutual risk, as a means by which the insurer protects his family against the accidents which might occur to their fortune either from his death or his improvidence, or simply as an artificial mode of investing money. (Bell's Com. i. 629 ; Bell's Prin. 518 ; Marshall, 770 ; Park, 641. See Rose, Nov. 25, 1848, 11 D. 151.)

1824. The premium in consideration of which the insurer agrees to pay a certain sum on the death, or a certain annuity during the life of the insured, is proportioned to his age, health, and other circumstances.

1825. As in marine and fire, so, for still more obvious reasons, in life insurance, there can be no insurance where there is no interest. (14 Geo. III. c. 48.) The name of the party to be benefited must appear on the policy, and no more can be recovered by him than the amount or value of his interest.

1826. A creditor has an insurable interest in his debtor's life, but not if the debt be a gaming debt. (Bell's Com., Shaw's ed. 505 ; Lindsay, Feb. 19, 1851, 13 D. 718 ; Shand, May 31, 1859, 21 D. 878.)

1827. It is said (Bell's Com., Shaw's ed. i. 505) that a father has no insurable interest in the life of his son ; but this is doubtful, and such insurances are quite common : a father has

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no other way of covering loss of outfit, purchase of a commission, or of a business. A wife or children have a sufficient interest to entitle them to open a policy on the life of the husband or father. (See *Wight*, 1849, 11 D. 459.) The same rules as to representation and warranty prevail as in the other insurances.

1828. The general declaration, that the person whose life is offered for insurance has "no disorder tending to shorten life," implies not that he is free from disease, which in every form has this tendency, but that he is in a reasonably good state of health, and has no known disease likely to lead directly to his death. (*Ross v. Bradshaw*, 1 Black, 312; *Willis v. Poole*, Park, 650, Marsh, 771; *Hutcheson*, Feb. 21, 1845, 7 D. 467.)

1829. In most life policies, death abroad or at sea is excepted; but unless excepted expressly, it is covered by the policy. (Bell's Prin. 523.)

1830. Death by suicide, duelling, or by the hand of justice, is fatal to an insurance even when effected by creditors. (Bell's Com., Shaw's ed. i. 507.) In the case of the *Amicable Society v. Bolland*, it was held in the House of Lords, reversing the decision of the Court below, that the policy effected by *Fauntleroy*, who was executed for forgery, was forfeited, though there was no exception as to death by the hand of justice. (4 Bligh, N. S. 194.) It has been decided in England that a policy is not due where the insured killed himself while mad. The question is open in Scotland.

1831. The full sum in a life policy must always be paid as in a total loss.

1832. Life policies are constantly assigned in security for debt. A policy thus assigned reverts to the original holder when the debt is paid, and may be made the means of credit on another occasion. Assignment in sequestration, or under a commission of bankruptcy, carries a policy of life insurance.

1833. By 16 and 17 Vict. c. 34, sec. 54, it is provided, that persons who have made insurance, or contracted for a deferred

annuity on the lives of themselves, or their wives or children, shall be entitled to deduct the amount of the annual premiums paid for such insurance, or the annual sum deducted from their salaries or stipends, from the income tax for which they are liable. But no such abatement can be made beyond one-sixth part of the whole amount of profits and gains; nor does such abatement entitle any one to claim total exemption on the ground of his profits or gains being reduced below the assessable amount.

1834. This Act has been extended for a limited time by subsequent Acts.

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## CHAPTER XII.

### COPYRIGHT.<sup>1</sup>

1835. The earliest statute by which an attempt was made to extend to published literary works that protection which, in some imperfect measure, they had enjoyed, by means of special licences and patents, and the practice of printers and booksellers as far back as the time of Elizabeth, but which it has been found, both here and in England, that the common law does not afford them, was 8 Anne, c. 19 (1709).

1836. In Scotland "it was customary for the Lords of Privy Council to grant exclusive right to print and vend books for certain terms. . . . Most generally this right was given to booksellers and printers, and bore reference rather to the mercantile venture involved in the expense of producing the book than to any idea of a reward for authorcraft." (Chambers's Domestic Annals of Scotland, vol. iii.)

1837. In this statute, which extended to Scotland, it was

<sup>1</sup> As to the legislation of different countries on the subject of copyright, see *Traité des droits d'Auteurs*, par M. Charles Renouard, Paris 1838; and Curtis on the Law of Copyright, London and Boston, 1847.

enacted that the author should have the sole liberty of printing his works for fourteen years ; and if he were living at the end of that term, that the right should return to him for another period of the same duration. At the end of 28 years, at most, the copyright lapsed, and the work became public property. (*Beckett and others v. Donaldson*, *Brown's Parliamentary Cases*, vol. ii. p. 136.)

1838. This term was extended, and additional regulations introduced, by subsequent statutes (41 Geo. III. c. 107 ; 54 Geo. III. c. 156), which, along with that just referred to, were repealed by 5 and 6 Vict. c. 45 (1st July 1842). By this enactment the whole law relating to copyright in books was consolidated, and by it, as regards books published in Great Britain, it is still regulated.

1839. *What is a book?*—The statute defines a book to mean “every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan, separately published.” (Sec. 2.) The term, as thus limited, does not include *designs* for ornamenting articles of manufacture, even although published in the *form* of a book ; separate arrangements for the protection of which were made by the *Designs Acts* of 1842, 1843, and 1850, now consolidated and amended by the *Copyright of Designs Act*, 1858. (21 and 22 Vict. c. 70 ; *infra*, sec. 1858.) The republication of a standard author with notes sufficient to impart an additional value to the book has been held to constitute a new work entitled to the protection of copyright against piracy of such notes. (*Black*, 1870, 9 M. 341.)

1840. By section 3 of 5 and 6 Vict. c. 45, it is provided, that the copyright of every book, as thus defined (*ante*, sec. 1828), published in the lifetime of its author, shall endure for his natural life, and for the further term of seven years commencing at the time of his death, and shall be the property of the author or his assigns, provided that, if the term of seven

years shall expire before the end of forty-two years from the first publication, the copyright shall in that case endure for such period of forty-two years; and that the copyright in every book published after the death of its author shall endure for the term of forty-two years from the first publication, and shall be the property of the proprietor of the author's MS. from which such book shall be first published, and his assigns.

1841. There *must* thus, in every case, be a copyright for forty-two years, and there *may* be a copyright for a longer period, should the life of the author, and the seven years after his death, extend beyond the forty-two years.

1842. The extended period applies to copyrights under the old law, if held by the author or his representatives; but if belonging to "a publisher or other person who shall have acquired it for other consideration than that of natural love and affection," the extended term is to apply only in the case of the author, or his personal representative if he be dead, joining with the proprietor in a minute of consent, to be entered in the Stationers' Hall Register. The term "personal representative," when rendered into the legal phraseology of Scotland, means the person or persons who have succeeded to the moveable as opposed to the heritable estate, or the executor under a will as their representative. (Secs. 4 and 25.)

1843. To provide against the suppression of books of importance to the public, of which the authors are dead, it is enacted that the Judicial Committee of the Privy Council, on complaint that the proprietor of the copyright refuses to republish or allow republication, may license the complainant to publish the book.

1844. Copies of all books published after the passing of the Acts, and copies of all subsequent editions with any additions or alterations, must be *delivered* at the British Museum within one calendar month if published in London, or within three calendar months if published elsewhere in Britain. In like manner,

copies shall be given to the Bodleian Library at Oxford, to the Public Library at Cambridge, to the Library of the Faculty of Advocates, Edinburgh, and to the Library of Trinity College, Dublin (sec. 8), *on demand in writing* being left at the abode of the publisher at any time within twelve months, under the hand of the officer of the Company of Stationers appointed for the purposes of the Act, or under the hand of any other person authorized by these bodies. This arrangement was a modification, and a very important one for the public interest, of the obligation which was imposed on publishers, by the former statutes, to *deliver* eleven copies of each new work to certain universities and other public institutions.

1845. By sec. 9, publishers are permitted to deliver their books at the libraries themselves, in place of at Stationers' Hall; and by sec. 10, a penalty not exceeding five pounds, in addition to the value of the book, is imposed in case of failure to comply with these requirements.

1846. *Register at Stationers' Hall.*—A book of registry is to be kept at Stationers' Hall, open to inspection for a fee of one shilling (sec. 11), wherein it shall be lawful for, but not, as formerly, obligatory on, the proprietor of copyright on any book to make entry of the title of such book, the time of the first publication thereof, and the name and place of abode of the proprietor of the copyright, or of any portion of the copyright, upon payment of the sum of five shillings to the officer of the Company; and every such registered proprietor may assign his interest, or any portion of his interest therein, by making entry in the said register of such assignment, and of the name and place of abode of the assignee, on payment of the like sum, and such assignment shall be effectual without being subject to any stamp or duty, and shall be of the same force as if made by deed. (Sec. 13.) No proprietor of copyright shall sue or proceed for any infringement of the Act before making entry in the book of registry. (Sec. 24.)

1847. Persons aggrieved by any entry in the book of registry may apply to a court of law in term, or to a judge in vacation, who may order such entry to be varied or expunged. (Sec. 14.)

1848. Any person who shall print, or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent, in writing, of the proprietor, or shall import for sale or hire any such book unlawfully printed from parts beyond the sea, or knowing such book to have been so printed or imported, shall trade with it, or have it in his possession for purposes of trade, shall be liable to an action of damages. (Sec. 15.)

1849. A subsequent clause provides a summary mode of punishment by conviction before two justices of the peace—by the forfeiture of the books, besides the imposition of a penalty of £10, and double the value of the books, on any person except the proprietor, or a person authorized by him, who shall import into the British dominions, for sale or hire, books first composed, written, or printed and published in any part of the said kingdom, and reprinted elsewhere.

1850. The books seized by the officers of Customs or Excise, in obedience to this section, are to be destroyed. (Sec. 17.)

1851. An alien may own the copyright of a work published first in Great Britain; but he cannot claim an English copyright in a work which has been published first in a foreign country with which there is no international law of copyright. Attempts are often made to obtain both a British and an American copyright, by issuing the work in both countries on the same day.

1852. *Reviews, Encyclopædias, etc.*—A new and important arrangement is introduced as to the copyright of works produced by the joint efforts of several individuals. By sec. 18 it is enacted, that when the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or of any book whatsoever, shall have employed several persons to compose the same, the copyright in every such

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work shall belong to the proprietor as if he were the actual author thereof; and as against third parties he shall be protected for the full period of forty-two years; but after the term of twenty-eight years, the right of republishing the articles of which such works are composed shall revert to their authors for the remainder of the term given by the Act. It is further provided, that, during the twenty-eight years, the proprietor shall not publish the articles singly or separately without the consent of their authors; nor shall those authors be affected who have reserved, or may in future reserve, the right of publishing their articles in a separate form. (Sec. 18.)

1853. *Musical and Dramatic Works*.—The provisions of the Act are extended to musical compositions, and the term of copyright, as provided by the Act, is applied to the liberty of representing dramatic pieces and performing musical compositions. Songs are thus protected from being sung, and pieces from being set to music for sale, without permission. (Sec. 20.) Dramatic piece includes "every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment." The first representation or performance of these pieces (when) not printed is the date of first publication, and the privilege of copyright begins from that date. (Guthrie's Bell's Prin. 1359.)

1854. *Engravings, Maps, etc.*—The copyright of engravings, works of art, maps, plans, etc., on plates is twenty-eight years from the day of publication. It is still regulated by the statutes 8 Geo. II. c. 13, 7 Geo. III. c. 38, 17 Geo. III. c. 57, 7 Will. IV. c. 59, the provisions of which are extended, by 15 Vict. c. 12, to prints taken "by lithography, or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely." (Sec 14.) Original paintings, drawings, and photographs are protected for the author's life, and for seven years after his death, by 25 and 26 Vict. c. 68.

1855. *Sculpture*.—By 54 Geo. III. c. 56, the sole right and

property of all new and original sculpture, models, copies, and casts, is vested in the proprietors for fourteen years (sec. 1), and for an additional term of fourteen years to the original sculptor, should he be living. (Sec. 6.)

1856. *Universities*.—The privileges of perpetual copyright held by the universities in any works deposited with them, in order that the profits of the publication may be applied to the advancement of learning, under 15 Geo. III. c. 53, are reserved. (Sec. 27.)

1857. *Lectures* delivered in public are protected by a special statute (5 and 6 Will. IV. c. 65) from publication by those who, by the payment of fees or otherwise, have obtained permission to hear them; and when published by their authors they enjoy the same copyright as other works. There is an exceptional power (sec. 5) in the case of lectures delivered in any university, public school, or college, "in virtue of or according to any gift, endowment, or foundation." *Quotations* are in a more difficult position; but it is always a question for a jury to say whether an unfair advantage has been taken, such as that an author is pilfering part of the work under pretence of reviewing it. Abridgments, translations, and notes, so far as fair, are protected; but an abridgment of a work must be the expression of its substance in the author's own language. (Bell's Prin. 1359.) See the case of Black (*supra*, sec. 1839) as to the reproduction of passages without acknowledgment from a copyright work in the form of notes to a fresh edition of a work whose copyright has expired.

1858. *Letters*.—The Court of Session has always held itself competent to protect epistolary correspondence, not on the ground of copyright, but of right on the part of the writer to protect his reputation and his privacy; and a like power has been exercised by the Court of Justiciary. (Proceedings in the case of the "Scotch Thistle" newspaper; Irvine's Report of the Trial of Madeleine Smith, 93 and 305.) In England, epistolary

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correspondence is held to be the property, not of the receiver, but of the writer. The receiver may retain the letter for his own use, but he cannot publish it without the permission of the writer or his heirs; neither can he sell it as a curiosity. (Curtis on the Law of Copyright, pp. 87, 89 *et seq.*)

1859. *Newspapers*.—Newspaper matter is subject to the law of copyright, but, for mutual convenience, the practice of copying intelligence without acknowledgment, and even leading articles when acknowledged, is generally tolerated by the members of the press.

1860. *International Copyright*.—The leading enactment on this subject is 7 Vict. c. 12, as extended and explained by 15 Vict. c. 12. By the first of these statutes the Crown is empowered, by Order in Council, to extend the privileges of British copyright to works first published in foreign countries, but provided that no such Order shall have effect unless it shall be therein stated as the ground for issuing it, that reciprocal protection to the works of British authors has been secured. (Secs. 2 and 14.)

1861. The provisions of the British Copyright Acts as to the entries in the register book at Stationers' Hall are incorporated in the International Copyright Act.

1862. By the subsequent statute (15 Vict. c. 12), an Order in Council may be issued to the effect that the authors of books published in foreign countries may, for a limited time, prevent unauthorized translations of their works from appearing in Britain. The time is not more than *five* years from the publication of an authorized translation. (Sec. 3.)

1863. The same privilege may be extended to the authors of dramatic works represented in foreign countries; but adaptations of dramatic pieces on the English stage are not prevented. (Sec. 6.) But an Order in Council may direct that the said sec. 6, allowing adaptation of foreign dramatic or musical pieces, shall not apply in certain cases, thus extending the protection

in these cases to all imitation or adaptation also. (38 Vict. c. 12.)

1864. All articles in newspapers or periodicals relating to politics may be republished or translated, and also all similar articles on any subject, unless the author has notified his intention to reserve the right. (15 Vict. c. 12, sec. 9.)

1865. The prohibition against the importation of works illegally printed abroad, which the former Copyright Acts had confined to those originally printed in Britain, is extended to all works wherein there is any subsisting copyright under the International Copyright Acts, except as regards the country in which such works are published, and to all unauthorized translations. The provisions of 5 and 6 Vict. c. 45, as to forfeiture of pirated works, are extended to works prohibited to be imported under this Act. (Sec. 9.)

1866. In accordance with the convention entered into with France, it is enacted, that French translations shall be prohibited, and this without any further order in Council. (Sec. 11.) Further, in fulfilment of the said convention, the duties on books and engravings published in France are reduced; and it is enacted that these duties shall not be raised during the continuance of the treaty; and if a further reduction be made for other countries, it shall be extended to France.

1867. *Copyright in Designs.*—By the [Patents, Designs, and Trade Marks Act, 1883, copyright in registered designs extends for five years from the date of registration. It is essential to the existence of a copyright that the proprietor furnish the requisite number of exact representations or specimens of the designs to the Comptroller-General of Patents, Designs, and Trade Marks, and that the prescribed mark denoting registration of the design be affixed to every article to which it applies before the article is sold. (Secs. 50, 51.) Registered designs, for obvious reasons, are not, like patent specifications, open to public inspection. On the expiry of the copyright they may,

[however, be inspected and copied. (Sec. 52.) If a registered design be used in a foreign country, and is not used in this country within six months of its registration, the copyright ceases. (Sec. 54.) The Act makes a similar international provision in regard to designs as to patents. (Sec. 103 ; *infra*, sec. 1898.) The former Acts are repealed.]

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## CHAPTER XIII.

### OF PATENTS.

1868. The law of patents is closely analogous to the law of copyright. The principle of the law of patents bears the semblance of a compromise of antagonistic interests, and substantially it is this. The interest of the inventor is a perpetual monopoly, while the public interest is to derive immediate benefit from the invention. Expediency demands that neither interest should be paramount, for the necessary result would be to check the enthusiasm of inventors. Any person who invents or discovers a new manufacture, or who introduces a foreign invention into the country, is, provided he is the first publisher of the invention, entitled to apply for a patent. A person who has learned the thing from another is not dealt with as the inventor, except as to foreign inventions. The fact of employing another in the investigation does not deprive the originator of the right to the patent ; but the *mere* paying of another to invent new manufactures does not entitle the employer to the patent, which is fairly the property of the workman. (Guthrie's Bell's Prin. 1350.)

1869. The power of granting patents of invention, like patents of corporation, forms a part of the royal prerogative.

1870. When the power of the Crown, to grant monopolies in other cases, was abolished in England by 21 Jac. 1. c. 3, in con-

sequence of the unwarrantable use which had been made of it at the instigation of the Duke of Buckingham, this privilege was retained as regarded "letters patent to use new manufactures" (sec. 5); and this rule seems by tacit consent to have been followed in Scotland (Bell's Com. '138), notwithstanding the apparently general import of a subsequent Scottish statute (1641, c. 76).

1871. [The law of patents has recently been consolidated by the "Patents, Designs, and Trade Marks Act, 1883" (46 and 47 Vict. c. 57). This Act repeals all the previous statutes or portions of statutes dealing with patents, beginning with 21 Jac. I. (except sec. 6, on which the present law of patents for inventions rests by their exemption from the general repeal of monopolies, which is the object of that statute). It came into force on 1st Jan. 1884.

1872. [Any person, whether a British subject or not, may make application for a patent, and two or more persons may apply for and hold a patent jointly. (Sec. 4.) The application must be in the form prescribed by the Act, and must be accompanied by a specification, either provisional or complete, of the invention, and a signed declaration that the applicant believes himself to be the true and first inventor. (Sec. 5.) But it is no objection to the validity of a patent that some one has made the invention before and kept it secret.

1873. [The complete specification may be lodged any time within nine months of the application; but if not then lodged, the application is deemed to be abandoned. (Sec. 8.)

1874. ["A provisional specification must describe the nature of the invention." "A complete specification must particularly describe the nature of the invention, and in what manner it is to be performed." The former is meant only to disclose the nature of the invention until the inventor has perfected its details; the latter must be sufficiently detailed and intelligible not only to enable a workman of ordinary skill to put the

[invention into practice, but to show the public what cannot be done without infringing the patent. Both must be precise, unambiguous, clear, and full, and must distinctly separate that which is new from that which is old. The title and provisional specification must accord with the complete specification and the letters patent. The complete specification must not contain any new invention not included in the provisional one. (Bell's Prin. 1352; Morton, 1863, 1 M. 718; Dudgeon, 1873, 11 M. 863; Bailey, 1877, 4 R. 545, aff. H. L. 5 R. 179; Gillies, 1877, 5 R. 337; Stoner v. Todd, L. R. 4 Chan. Div. 58; United Telephone Co. v. Harrison, etc., L. R. 21 Chan. Div. 720; Daniel, New Law of Patents, etc., p. 33 *et seq.*)

1875. ["A complete specification must end with a distinct statement of the invention claimed." The claim is a summary of all the points in the machine or process, which the applicant pretends to be new and of his own invention. In naming his claims—and the same observation applies to the title of the invention—the applicant should be careful to avoid every vague and general term which will cover more than is included in his invention. The patent is granted for that "which he has given to the public, but not that which is the mere subject of his speculation or imagination, or of his endeavouring to grasp more than he is entitled to." (Tetley v. Easton, Macr. Pat. Cases, 48.)

1876. [Unless a complete specification is accepted within twelve months from the date of application, then (save in the case of an appeal having been lodged against a refusal to accept from the comptroller to the law officer as directed by the Act) the application becomes void. (Sec. 9.)

1877. [On the acceptance of the complete specification the fact is advertised by the comptroller, and the specification with relative drawings (if any) becomes thenceforth open to public inspection. (Sec. 10.)

1878. [Notice of opposition to the grant of the patent must be given at the patent office within two months from the date of

[the advertisement of the acceptance of the complete specification. The opposition must be on one or more of the following grounds only:—(1) that the applicant obtained the invention from the opposer or from some one of whom he was the legal representative; (2) that the invention has been already patented in this country on an application of prior date; or (3) that an examiner has already reported to the comptroller that the invention is comprised in the specification of a previous application. The contention between the objector and the applicant is heard and decided by the comptroller with appeal to the law officer. (Sec. 11.)

1879. [The patent must be sealed within fifteen months from the date of application unless delayed by appeal to the law officer or by opposition to the grant. Should the applicant die before the expiry of the fifteen months, the patent may be granted to his representatives, and sealed any time within twelve months after his death. (Sec. 12.) The date of a patent runs from the day of application. (Sec. 13.)

1880. [Publication of the invention before the date of the patent, either by a description of it in a book or pamphlet or by public use of the invention, voids the patent; but a confidential disclosure merely will not have that effect. (Daniel, p. 19 *et seq.*

1881. [*Provisional Protection.*—When an application for a patent has been accepted, the invention may, during the period between the application and the sealing, be used and published without prejudice to the patent to be afterwards granted for it. (Sec. 14.)

1882. [*Protection by Complete Specification.*—After the acceptance of his complete specification the applicant has the like rights and privileges from that time till the sealing of the patent as he has after it is sealed, except that he cannot institute an action for infringement till the patent has been granted to him. (Sec. 15.)

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1883. [*Extent and Duration.*—Every patent when sealed has effect throughout the United Kingdom and the Isle of Man, thus excluding the Channel Islands. (Sec. 16.) The duration of every patent is fourteen years. It falls if the patentee shall not make the payments prescribed by the Act.<sup>1</sup> If the failure to pay has been due to accident or inadvertence,

<sup>1</sup> [The following is the schedule of fees appended to the Act, which the Board of Trade has power, with consent of the Treasury, from time to time to reduce:—

### FEES ON INSTRUMENTS FOR OBTAINING PATENTS, AND RENEWAL

#### (a) *Up to sealing.*

	£	s.	d.	£	s.	d.
On application for provisional protection, . . . . .	1	0	0			
On filing complete specification, . . . . .	3	0	0			
					4	0

or

On filing complete specification with first application, . . . . .	4	0	0
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#### (b) *Further before end of four years from date of patent.*

On certificate of renewal, . . . . .	50	0	0
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#### (c) *Further before end of seven years, or in the case of patents granted after the commencement of this Act, before the end of eight years from date of patent.*

On certificate of renewal, . . . . .	100	0	0
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Or in lieu of the fees of £50 and £100 the following annual fees:—

Before the expiration of the fourth year from the date of

	the patent, . . . . .	10	0	0
"	" fifth " " . . . . .	10	0	0
"	" sixth " " . . . . .	10	0	0
"	" seventh " " . . . . .	10	0	0
"	" eighth " " . . . . .	15	0	0
"	" ninth " " . . . . .	15	0	0
"	" tenth " " . . . . .	20	0	0
"	" eleventh " " . . . . .	20	0	0
"	" twelfth " " . . . . .	20	0	0
"	" thirteenth " " . . . . .	20	0	0

[the patentee may, on satisfying the comptroller of this, obtain an enlargement of the time for paying to the maximum of three months.]

1884. *Infringement*.—If a patent be infringed, the patentee has an action of damages against the infringer for the loss sustained. Such an action is defensible on the grounds either of no infringement or nullity of the patent. The invalidity of the patent may be established (1) by objections to the form of the letters patent, or (2) of the specification, (3) by showing that the patentee was not the inventor, (4) that the article was not a fit subject for a patent, (5) that the specification is not sufficient, and the like. (Guthrie's Bell's Prin. 1353 B.) [If an action be raised for infringement committed after the failure to pay and before enlargement has been granted, the Court may refuse to give damages for the infringement. (Sec. 17.) Unless the Court otherwise direct, the action is to be tried without a jury, but with the aid of an assessor specially qualified, if the Court think fit to call him in. (Sec. 28.) In an action for infringement, the Court may certify that the validity of the patent came in question; and if it should so certify, then in any subsequent action for infringement, the pursuer in that action, in obtaining a final judgment in his favour, shall have his full expenses as between solicitor and client, unless the Court certify that he ought not to have them. (Sec. 31.)

1885. [*Amendment of Specification*].—An applicant or a patentee may from time to time, by written request to the Patent Office, seek to amend his specification by way of disclaimer, correction, or explanation. Applications to amend must be advertised, and are to be treated as regards opposition and right of appeal in the same way as the original application. But no amendment is allowed which would make a substantially different invention from that originally specified. Leave to amend is conclusive as to the parties' right to amend, except in the case of fraud; and the amendment when allowed is deemed

[part of the specification. An application to amend cannot be proceeded with pending an action for infringement. (Sec. 18.)

1886. [A patentee may, in the course of an action for infringement or of a proceeding for revocation of a patent, obtain from the Court leave to amend his specification by way of disclaimer. (Sec. 19.) Where an amendment has been allowed, no damages in respect of the use of the invention before the amendment can be given unless the patentee establishes to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge. (Sec. 20.)

1887. [*Compulsory Licence*.—A patentee may be compelled by the Board of Trade, on a petition by any one interested, to grant licences to work his patent on such terms as to royalties or otherwise as the Board may deem just. But the order can proceed only on its being proved to the satisfaction of the Board that, by reason of the default of the patentee to grant licences on reasonable terms, either (a) the patent is not being worked in the United Kingdom, or (b) the reasonable requirements of the public with respect to the invention cannot be supplied, or (c) any person is prevented from working or using to the best advantage an invention of which he is possessed. (Sec. 22.)

1888. [A register of patents is to be kept at the Patent Office, which shall contain the names and addresses of grantees of patents, notifications of assignments and of transmissions of patents, of licences under patents, and of amendments, extensions, and revocations of patents and other matters affecting the validity or proprietorship of patents. It shall be *prima facie* evidence of anything directed to be inserted in it. (Sec. 23.)

1889. [*Extension of Term of Patent*.—A patentee may, not later than six months before the expiry of his patent, present a petition to Her Majesty in Council for its extension. To this application any person may enter a *caveat*. The petition may be referred to the Judicial Committee of the Privy Council. If they report in favour of extension, the same may be granted for

[seven, or in exceptional cases fourteen years ; or a fresh patent may be granted to the applicant. (Sec. 25.)

1890. [*Revocation*.—Proceedings for revocation of a patent may be taken in Scotland in the form of an action of reduction by (a) the Lord Advocate, (b) any person authorized by him to do so, (c) any other person alleging that the patent was granted in fraud of his rights, (d) any person alleging that he himself was the true inventor of any invention included in the patentee's claim, or (e) any person alleging that anything claimed by the patentee has been publicly manufactured, used, or sold within the realm before the date of the patent. A private petitioner requires the concurrence of the Lord Advocate, which is given only on good cause shown. When a patent has been revoked on the ground of fraud, the true inventor may obtain a patent in lieu of the revoked one, bearing the date of the revocation, and endurable for the term of the revoked one. (Sec. 26.)

1891. [*Rights of the Crown*.—A patent has the same effect against the Crown as against a subject, but the Crown may purchase the use of it for the public service either by agreement with the patentee, or, in default of agreement, on terms to be settled by the Treasury. (Sec. 27.)

1892. [A patent is for one invention only, though the application for it may contain more than one claim ; but it is not a competent objection, in any action concerning a patent, that it comprises more than one invention. (Sec. 33.)

1893. [The possession of an invention forms a right of property descendible to the heirs of an inventor who may have died without having patented it. His representatives may do so on application within six months of the inventor's death. (Sec. 34.) A patent granted to the first and true inventor cannot be invalidated by any application in fraud of him, or by any provisional protection granted thereon, or by any use following on the protection. (Sec. 35.) A patent may be assigned to any other place than that to which it was originally granted.

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[(Sec. 36.) The loss or destruction of a patent may be remedied by the issue of a duplicate. (Sec. 37.)

1894. [The exhibition of an invention at an industrial or international exhibition, certified as such by the Board of Trade, or the publication of any description of the invention during the exhibition, or its use in the exhibition merely for exhibition purposes, or its use by any other person during the period of the exhibition elsewhere without the inventor's consent, does not prejudice the inventor's right to obtain a patent, provided that (a) he has given the comptroller due notice of his intention to exhibit; (b) the application has been made before or within six months from the opening of the exhibition.

1895. [An illustrated journal of patented inventions, reports of patent cases, and other information, are ordered to be issued periodically and kept on sale by the comptroller, along with copies of all complete specifications, and indexes and abridgments of specifications. (Sec. 40.) The control of the Patent Museum is now vested in the Science and Art Department, whom the patentee must furnish with a model of his invention, on payment of the cost of manufacture as fixed by the Board of Trade. (Secs. 41, 42.)

1896. [Sec. 44 provides for the assignment of inventions of improvements on instruments or munitions of war to the Secretary of War, and for keeping these inventions secret for the purposes of State. The specifications of such inventions are not left for public inspection, but kept sealed until the Secretary for War shall have decided to take them up or not.

1897. [The Act affects existing patents only so far as it re-enacts the provisions applicable to such patents of the previous Acts, which it repeals. (Sec. 45.)

1898. [*International Arrangements.*—Where an arrangement exists with any foreign government for mutual protection of inventions, a prior application for a patent in that State shall have precedence over a subsequent one in the United Kingdom,

[and the foreign patent shall have the date of its native protection, provided the application be made here within seven months from the date of the foreign application. (Sec. 103.)

1899. [An English patent is not to prevent the use of an invention in foreign ships for the purpose of navigating them in British waters, provided it be not used for the manufacture or preparation of anything to be sold in or exported from the United Kingdom, except in ships of foreign States in whose ports British ships are prevented from using foreign inventions. (Sec. 43.)]

1900. *Principle*.—It is a fixed point in patent law that the patent must be for a vendible matter, and *not for a principle*. “The very statement of what a principle is,” said Mr. Justice Buller (in *Boulton v. Bull, v. Croyton*, p. 69 *et seq.*), “proves it not to be a ground for a patent; it is the first ground and rule for arts and sciences, or, in other words, the elements and rudiments of them. A patent must be for some new production from those elements, and not for those elements themselves.” And, in another case (*Neilson v. Harford* (1841), Web. P. R. 343), it was held that “the patent is not for a principle, but for the mode of carrying that principle into practice.”

1901. But infinite difficulty has arisen in fixing, in individual cases, the point at which the principle becomes a vendible commodity. Mr. Croyton, in his “Treatise on Patent Law,” thus states the results of the various discussions to which the subject has given rise:—“As a general rule, wherever a discovery is made of a principle or property of matter applicable to the improvement of manufactures, there is good ground for a patent, provided the subject-matter of it be expressed in the proper form.” The original discoverer cannot, however, take out a patent for its general application. Thus, Mr. Justice Heath says, “that a patent could not be claimed for the use of the power of steam. It must be for the vendible matter, and not for the principle.” (Croyton, 177.) The reason of this rule

seems to be better given by Mr. Bell than by any of the English authorities, where he says that, if the discovery of the expansive force of steam had been made the subject of patent, "it would have comprehended and restrained any future invention proceeding on that principle." (Com. 541.)

1902. Letters patent are granted of the patentee, "his executors, administrators, and assigns," and therefore, though bearing a tract of future time, have been held to be moveable. (*Advocate-General v. Oswald* (1848, 10 D. 969); Bell's Lect. p. 327; Bell's Prin. 1480, note *k*; Nicolson's Ersk. p. 284, note *b*.)

1903. *Simultaneous Invention*.—Where there are simultaneous applications, the decision of the claim is left to the law officer of the Crown. The rule which has been followed seems to be, that if several persons have possessed a knowledge of the invention in common, no one of them can obtain a patent. But the case is different when several persons have made the discovery at the same time, but without communicating it to each other or using it. In these circumstances, the patent will be given to the first applicant.

1904. *Aid in Invention*.—The claimant must be really the inventor, and must not have availed himself of the suggestions of another person. The rule as to the employment of servants is this: "If the servant make a new discovery by himself, such invention becomes his property; but if the master plans, and the servant only executes, *with alterations of his own*, then the master is the true inventor." (Godson, 28.) It is not unusual for letters patent to be taken in the names of two or three persons; but if it should be discovered that any one or more of these persons had no share in the discovery, the patent would be void. (*Ibid.*)

1905. It was formerly decided that a patent cannot be taken for Scotland if the invention has been in use in England; and international questions between the two countries are now

precluded, 15 and 16 Vict. c. 83 being applied to the whole kingdom.

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## CHAPTER XIV.

## SECURITIES FOR DEBT.

1906. *Personal Bond*.—We have already mentioned (*ante*, pp. 359, 360), that bills and promissory notes are very frequently used as simple and economical methods of constituting personal obligations. But, where special conditions are attached to the loan, or where the money is likely to remain unpaid for a lengthened period, the personal bond which carries the long prescription of forty years must be resorted to.

1907. The bond is a simple acknowledgment of the receipt of, and obligation to repay, money lent or otherwise owing, executed with the formalities requisite in all probative writings. (*Ante*, pp. 213, 214.)

1908. Bonds, with a clause obliging the debtor to pay interest, unless made heritable by express destination, are moveable in questions of succession by statute 1661, c. 32; but, as rights bearing a tract of future time, they are heritable in questions between husband and wife, and with the "fisk" or exchequer (*quoad fiscum*).

1909. Bonds usually contain a clause imposing a penalty, in case of failure to pay, of "a fifth more," that is to say, over and above performance of the primary obligation. But whatever may be the extent of the penalty, it is liable to an equitable reduction by the Court, so as to meet the damage actually incurred. (*Menzies*, 196; *Gordon v. Maitland*, Nov. 27, 1761, M. 10050; *Young v. Sinclair*, May 21, 1796, M. 10053; *Cowper v. Stuart*, Jan. 4, 1740, M. 10044; *Ramsay v. Goldie*, June 22, 1826, 4 S. 737.)

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1910. A bond generally contains a clause of "registration for execution." If registered, in terms of this clause, in the books of a court having jurisdiction to enforce it, execution will proceed against the person and property of the debtor, a simple extract from the record being held equivalent to a decree of consent. (Menzies, 200.)

1911. In addition to being used as securities for the payment of money, such bonds are commonly employed to constitute cautionary obligations, or to grant security for a cash credit at a bank. (*Ante*, pp. 410, 416.)

1912. The rate of interest payable on a personal bond, though usually five per cent., depends, since the repeal of the usury laws by 17 and 18 Vict. c. 90 (10th August 1854), wholly on the stipulation of the parties.

1913. With reference to obligations entered into before the passing of the Act, it is provided (sec. 3), that "where interest is now payable upon any contract, express or implied, for payment of the legal or current rate of interest, or where, upon any debt or sum of money, interest is now payable by any rule of law, the same rate of interest shall be recoverable as if this Act had not passed." "Legal interest," where the contrary is not specified, still means five per cent. (*Smith v. Barlas*, Jan. 15, 1857.)

1914. *Heritable Bond*.—This is a form of security on land which, in practice, has almost entirely superseded the ancient obligations of wadset, and infeftment of annual-rent. (Menzies, 797 ; *Bell's Prin.* 909 ; 1 *Bell's Com.* 671.)

1915. By this deed the borrower obliges himself to repay the sum lent, with interest and penalty ; and in further security, and over and above his personal obligations, he grants to the creditor a real but redeemable right in the lands themselves, as well as in an annual-rent corresponding to the interest of the debt.

1916. There is generally a clause of registration for execution, as in the personal bond.

1917. *Bond and Disposition in Security*.—This form of security affords a more expeditious method of making good the debt, by giving the creditor a power or commission to sell the lands in certain circumstances. It is, in short, a complete conveyance of the lands to the debtor, redeemable on payment; the debtor being protected from advantage being taken of the power of sale thus conferred, by a clause in which the creditor is precluded from selling without warning of his intention, communicated in accordance with certain prescribed forms. This clause is strictly interpreted; and even where it is omitted, the Court will interpose to prevent the property from being surreptitiously disposed of. Neither is the creditor, even after notice, entitled to possess himself of the whole proceeds of the sale. He is merely entitled to pay himself, and must account to the debtor or his creditors for every farthing he receives beyond the sum requisite for that purpose. (Menzies, 801 and 810; Bell's Prin. 910; 1 Bell's Com. 672. See *Kerr v. Macarthur*, Dec. 23, 1848, 11 D. 301; *Jeffrey*, June 16, 1826, 4 S. 728; *Dickson*, Jan. 15, 1831, 9 S. 282.)

1918. Since 1661 (Act 1661, 32), personal bonds, though bearing a clause of annual-rent, have been moveable in all questions of succession, except as to the *jus relicte* and *quoad fiscum*. But, throughout the whole period embraced by our law, bonds containing warrants of infestment in favour of the grantee have been considered heritable. The result of this has often been, that people, who had in their ignorance invested their money upon land, practically disinherited their heirs in moveables, to the great advantage of the heir-at-law. The injustice of the inflexibility of this principle had been so frequently pointed out, that by the Act 31 and 32 Vict. c. 101, sec. 117, it is declared that all heritable securities shall in future be moveable, unless where by the terms of the bond executors are expressly excluded. But, as was provided by the Act of 1661, these rights are still to remain heritable as regards the rights of spouses and the fisc.

1919. *Absolute Disposition with Back Bond* is a form of landed security for future advances, sometimes given to bankers in security for a cash credit. (Principles, sec. 912.) It is in form an absolute conveyance of heritage; the creditor (disponee) granting the debtor (disponer) a back bond, disclosing the true character of the transaction. (Menzies, 811; 1 Bell's Com. 672.)

1920. Prior to 1845 the transmission of an heritable security could be effected only by means of a cumbrous deed, called a disposition and assignation, in which nearly the whole of the bond was narrated. And this had again to be followed by an equally prolix instrument of sasine. The Act 8 and 9 Vict. c. 31, section 1, greatly improved upon this state of matters by dispensing with the instrument of sasine, and allowing an abbreviated form of assignation, which, when recorded in the register of sasines, had the effect of infestment in favour of the assignee. The Act 31 and 32 Vict. c. 101, sec. 124, continues this provision; and in cases where the assignation is contained in a deed dealing with other matters, provides (schedule HH) for a short notarial instrument being expedite and recorded in lieu thereof. These provisions apply merely to the transference of securities *inter vivos*; but they may now be transferred by *any deed mortis causa*, or may be left to the operation of the law of succession. If not disposed of by deed, the form of transmission will depend on whether or not executors are excluded by the terms of the security. Where the executor is excluded, the bond is to all intents heritable, and the title of the heir is (sec. 125) completed by writ of acknowledgment, registered in the register of sasines; and in such a case, if the deceased have died testate, the grantee or legatee makes up his title by notarial instrument, which, when recorded (sec. 127), has the effect of a completed sasine. Where the executor has not been excluded by the terms of the security, an executor nominate, when duly confirmed, may complete his title by writ of acknowledgment, as

already mentioned ; and in cases of intestacy, the executor dative may complete his title by notarial instrument in the form of schedule JJ of the Act. Both these writs require to be recorded for the completion of the real right.

1921. "The chain of feudal titles to land," says Mr. Bell (Bell's Com., Shaw's ed. p. 905), "continues unbroken and unaffected by these rights in security, which are held as excrescences on the property, and may be created or dissolved without affecting the radical right to the estate, or touching the progress of titles."

1922. Though constituted feudally, they are mere accessories of the debt, and are discharged by its extinction, or annihilated by renunciation, without any feudal form of reconveyance.

1923. *Inhibition* is a mode of protecting an heritable security from alienation or depreciation. By this diligence the debtor inhibited is prevented from contracting any new debt which may be or become a burden on his heritage, or whereby it may be attached or alienated to the prejudice of the creditor inhibiting. Inhibition may be used on a depending action. Letters of inhibition are issued from the signet on a warrant from the Lord Ordinary on the Bills. (Stair, iv. 50 ; Ersk. ii. 11 ; Bell's Com. ii. 141 ; Bell's Prin. 2386 ; Menzies, 820.) Letters of inhibition may now be in the short form prescribed by the Act 31 and 32 Vict. c. 101, and they may be inserted in the will of any ordinary summons passing the signet. It is still necessary to present a bill and get the fiat of the Lords of Session before letters of inhibition can be procured, unless they are inserted in the will of a summons.

1924. In addition to the prohibition against the debtor, these letters prohibit the lieges from accepting a conveyance of his property, or taking vouchers of debt from him. With a view to this double prohibition, it is necessary that the letters of inhibition be not only executed against the debtor, but that they be published at the head burgh of the shire where he resides, or

edictally if he be abroad. It is also necessary that letters of inhibition be registered either in the local register of the county, or, if they be intended to apply to the whole of Scotland (1518, c. 119), in the general register at Edinburgh (1600, c. 13).

1925. Inhibition is strictly personal, and consequently, on the death of the person inhibited, his heir will not be affected by the prohibition, unless it be renewed against him. It is provided by the Bankrupt Act (19 and 20 Vict. c. 79), that the truster's right in a sequestration "shall not be challengeable on the ground of any prior inhibition, saving the effect which such exhibition may be entitled to in the ranking of creditors." (Sec. 102.) Inhibitions prescribe in five years. (37 and 38 Vict. c. 94, sec. 42.)

1926. *Modes of rendering Securities Effectual.*—Poining of the ground and actions of mails and duties are legal modes of rendering heritable securities effectual, the nature of which it scarcely belongs to the province of a popular work to explain. It is proper, however, to call attention to the following provision of the Bankrupt Act on the subject of these diligences :—

1927. "No poining of the ground which has not been carried into execution by sale of the effects sixty days before the date of the sequestration, and no decree of mails and duties on which the charge has not been given sixty days before the said date, shall (except to the extent hereinafter provided) be available in any question with the trustee. Provided that no creditor who holds a security over the heritable estate preferable to the right of the trustee, shall be prevented from executing a poining of the ground or obtaining a decree of mails and duties after the sequestration, but such poining or decree shall, in competition with the trustee, be available only for the interest on the debt for the current *half-yearly* term, and for the arrears of interest for one year immediately before the commencement of such term." (19 and 20 Vict. c. 79, sec. 118. 1856.)

## CHAPTER XV.

## OF THE POOR.

1928. Mr. Dunlop, in his valuable treatise on the Poor Law, has quoted from Fletcher of Saltoun's "Second Discourse concerning the Affairs of Scotland," a passage which is so well calculated at once to reconcile us to the present condition of the lower orders in this country, and to strengthen our hopes of its further amelioration, that we consider it a duty to reproduce it in the present work :—

1929. "There are at this day (1698) in Scotland (besides a great number of families very meanly provided for by the church boxes, with others who, with living upon bad food, fall into various diseases), 200,000 people begging from door to door. These are not only no ways advantageous, but a very grievous burden to so poor a country ; and, though the number of them be perhaps double to what it was formerly,<sup>1</sup> by reason of the great distress, yet in all times there have been about 100,000 of these vagabonds, who have lived without any regard or submission either to the laws of the land, or even of those of God and nature, — fathers incestuously accompanying their own daughters, the son with the mother, and the brother with the sister. No magistrate could ever discover or be informed which way any of these wretches died, or that they ever were baptized. Many murders have been discovered among them ; and they are not only a most unspeakable oppression to poor tenants (who, if they give not bread, or some sort of provision, to perhaps forty such villains in one day, are sure to be insulted by them), but they rob many poor people who live in houses distant from any

<sup>1</sup> As an opponent to the Union, Fletcher was bound to make the best of former times.

neighbourhood. In years of plenty, many thousands of them meet together in the mountains, where they feast and riot for many days ; and at the country weddings, markets, burials, and other the like public occasions, they may be seen, both men and women, perpetually drunk, cursing, blaspheming, and fighting together.”<sup>1</sup>

1930. The object of the earlier statute law of Scotland, beginning with the reign of James I. (1424, c. 7), is not so much to provide for the necessitous poor, as to suppress the disorderly gangs of whom Saltoun speaks, who are described as “maisterful beggars, and sornares, that dailie oppressis and harryis the kingis liegis” (1477, c. 77); and of whom we are told that they were in the habit of going about with “horse, houndes, and uther gudes.” The permission to beg, it is true, was given to the poor by the first enactment, and it was continued, under various regulations, “to cruiked folk, seik folk, impotent folk, and weak folk.” (1503, c. 70.) It was for their benefit, too, that in the time of James V. (1535, c. 22) the system of tokens was introduced, and each beggar was confined, in the exercise of his vocation, to the parish of his birth.

1931. But the most important of the earlier statutes, and that which forms the basis of our present poor law, was passed shortly after the accession of James VI. (1579, c. 74.) After repeating the penalties of former Acts against the classes of persons above described—amongst whom are included “vaga-bond schollers of the Universities of St. Andrews, Glasgow, and Airdene, not licensed by the Rector and Deane of Facultie of the Universities to ask almes”—the Act goes on to impose an assessment for the support of “pure, aged, and impotent persons.” “Provosts, baillies, and judges in the parochinis to landwart, and sic as they sall call to them to that effect,” are instructed “to tax and stent the hail inhabitants within the

<sup>1</sup> The condition of England, a century earlier, is described as having been extremely similar.—*Strype's Annals*, vol. iv. No. ccxiii. ; *Dunlop*, p. 6.

parochin, according to the estimation of their substance, without exception of persons, to sic oukly (weekly) charge and contribution, as sall be thought expedient and sufficient to susteine the saidis pure peopil." This taxation is directed to be renewed from year to year; but it is said that no assessment was actually imposed for upwards of a century afterwards. (Smith's Digest of the Poor Law, 87; but see Chambers's Domestic Annals, i. 345-6.)

1932. The management of the poor was transferred to the kirk-sessions and heritors of parishes by subsequent statutes (1592, c. 149; 1597, c. 272; and 1672, c. 18); and in Charles the Second's time the residential settlement of three years, which continued till 1845, was introduced.

1933. In addition to our statute law, there are various proclamations of the Privy Council of Scotland, which had been entrusted with something approaching to legislative powers in the matter, and whose directions were subsequently ratified by statute. (1698, c. 21.)

1934. The provisions contained in the whole of these statutes and proclamations divide themselves into two classes—the one relating to the punishment and latterly to the employment of vagabonds, and possessing throughout a penal character; the other having reference to the support of the aged and impotent poor. The former class, which probably never were very systematically enforced, "may now be considered as in total desuetude" (Dunlop, p. 25); the latter contained the provisions for the relief of the poor, which remained unchanged till the passing of the recent Act "for the amendment and better administration of the laws relating to the relief of the poor in Scotland" (8 and 9 Vict. c. 83, 4th Aug. 1845), and which, where unaffected by that statute, are still in force.

1935. The main provisions of this important statute are—  
(1.) The establishment of a central Board of Supervision, with one paid member and a secretary, with full powers to inquire into

the condition of the poor, and to make annual reports to the Secretary of State. The Board is further entrusted with certain limited powers of control over the parochial boards and their inspectors, such as the suspension and dismissal of these officers.

1936. (2.) The institution of a new parochial board in place of the heritors and kirk-session in all parishes in which an assessment has been levied. This board is to consist of the proprietors of heritage in the parish of above £20 of yearly value, together with members elected by the other ratepayers, and delegates from the kirk-session.

1937. (3.) The provision that no court of law shall entertain or decide any action relative to the amount of relief granted by parochial boards, unless the Board of Supervision shall previously have declared that there is a just cause of action, in which case the pauper shall be entitled to the benefit of the Poor's Roll in the Court of Session. The jurisdiction of the parochial board in reference to administering the funds, ordering and disposing of the poor, and determining the amount and nature of the relief to be given in each particular instance, is thus exclusive of every other in the first instance.

1938. (4.) The most important variation on the previous law, is the extension of the period necessary to acquire a settlement by residence to five years, and the introduction of the principle that residential settlements may be lost by non-residence alone for more than four years, or, in the words of the statute (sec. 74), if during any subsequent period of five years, the party "shall not have resided in such parish or combination continuously for at least one year."

1939. (5.) The provision for the removal of English and Irish paupers, and for their criminal prosecution on their return, under the statute 1579, c. 74.

1940. (6.) The provision for prosecution, under the same Act, of husbands deserting their wives, and of mothers and putative fathers refusing to maintain their illegitimate children.

1941. (7.) The right given to all destitute persons to claim interim maintenance from the parishes in which they become destitute, until the parish or combination to which they belong has been ascertained.

1942. (8.) The provision for the union of parishes under the authority of the Board of Supervision.

1943. (9.) Each parish or combination must appoint an inspector, in whose name all law proceedings connected with the poor proceed.

1944. A subsequent statute (24 and 25 Vict. c. 18) makes provision for the dissolution of combinations of parishes by the Board of Supervision, on application being made to it for that purpose by the parochial board.

1945. The existence of several excellent manuals on the subject of the Poor Law, intended and suited for popular as well as professional use,<sup>1</sup> render it unnecessary that we should do more than add to the above sketch such information as may serve for the practical guidance of such non-official persons as may interest themselves in the condition of the poor.

1946. *Application for Relief*.—The inspector of the poor in the parish or union in which the pauper happens to be resident for the time being, or the inspector of the district, if the parish has been so divided, are the persons to whom respectively application is to be made when a case of destitution occurs. It is not necessary that such application be in writing. (Sec. 70.)

1947. The inspector is bound to give interim relief, if the applicant appear *prima facie* to be fairly entitled to it, and that though he have no settlement in the parish, or to state his reasons for refusal, within twenty-four hours. If he provide the neces-

<sup>1</sup> 1. The Law of Scotland regarding the Poor, by A. M. Dunlop, advocate. Edition 1854.

2. Poor Law Manual for Scotland, by A. M'Neil Caird, Esq. 1851.

3. Digest of the Law of Scotland relating to the Poor, by J. Guthrie Smith, advocate. Third edition, 1878.

sary support in the meantime, he may delay his decision for such time as may be required for investigation. (Sec. 73.)

1948. If a pauper be refused relief altogether, he is entitled to apply to the Sheriff; but if his complaint be, not that he has been refused relief, but that the relief granted to him is inadequate, the Sheriff has no power, and he must go to the Board of Supervision. (Sec. 74.)

1949. *Medical Attendance and Education.*—By sec. 69, parishes are required to provide medical relief to the poor, and education for poor children. By sec. 69 of the Education Act, parents unable from poverty (though not themselves paupers entitled to relief) to pay the school fees of their children may apply to the parochial board to pay them out of the poor fund of the parish, [and they may do so though the parents are not otherwise entitled to parochial relief. (Ferrier, 1881, 9 R. 30.)]. (*Infra*, § 2007.) The Board of Supervision are the judges, and their decision is final. (Guthrie Smith, p. 217.)

1950. *Persons entitled to Relief.*—(1.) Poor persons of seventy years or upwards, or under that age, if so infirm as to be unable to gain a livelihood by their work.

1951. (2.) Orphans and destitute children under fourteen years of age, whether legitimate or illegitimate.

1952. (3.) All who, from permanent bodily disease and debility, are unable to work. "It is not necessary, to entitle such persons to relief, that they should be totally incapable of performing any work whatever;" it is sufficient that they be unable to work so as to gain a livelihood, and that they "must of necessity be sustained by alms." (Dunlop, p. 29.)

1953. Destitute widows and deserted wives with children are entitled to claim; and, in case of refusal, the *onus* of establishing that they are able to support themselves and their children, and consequently are not proper objects of relief, lies on the parish.

1954. Idiots and insane persons are entitled to support.

1955. The Lunacy Act, 1857 (20 and 21 Vict. c. 71, sec.

59), gives authority to district lunacy boards to arrange with existing asylums in the district for the appropriation of the whole or part of the same for the reception of pauper lunatics of the district. The Lunacy Act, 1862 (25 and 26 Vict. c. 54), authorizes the Lunacy Board to license lunatic wards of poor-houses for the reception and detention, on the order of the Sheriff, of pauper lunatics not dangerous; or to sanction their reception without a Sheriff's order. The Act further authorizes agreements for the reception of pauper lunatics in any public, private, district or parochial asylum or hospital within or beyond the limits of the district, county, or parish.

1956. Foreigners who have acquired a settlement in this country are, equally with natives, entitled to demand permanent relief from the parish of their settlement, or interim relief till that parish is ascertained, or they have been enabled to leave the country. None but English and Irish paupers can be compulsorily removed (8 and 9 Vict. c. 83, secs. 77-79); and a foreigner returning, whose passage had been paid by the inspector, would be entitled again to claim relief, and would not be liable to the penalties imposed upon English or Irish paupers returning.

1957. *Occasional Relief*.—The general, if not the exclusive object contemplated in the Scottish statutes, was the relief of those permanently disabled. But, though not imperative, the necessity of the case had introduced into almost every parish the practice of affording relief to persons labouring under temporary sickness.

1958. The right of such persons to relief is now established by the section of the recent statute which provides, that "all assessments imposed and levied for the relief of the poor shall extend and be applicable to the relief of occasional as well as permanent poor." (Sec. 68.)

1959. The same section provides, that "nothing herein contained shall be held to confer a right to demand relief on able-

bodied persons out of employment ;" leaving it, of course, an open question whether such right existed prior to that statute. The question as to whether this right existed under the former statutes, or at common law, which had given rise to much difference of opinion, was deliberately decided in the negative by the Court in the case of two able-bodied men, one claiming for himself, the other for behoof of his children ; and as this judgment of the Court was affirmed by the House of Lords on appeal, the point is placed beyond the reach of further discussion. (*Adams v. M'William*, and *Thomson v. Lindsay*, Feb. 27, 1849, 11 D. 719, aff. Mar. 26, 1852, 1 Macq. 120.) "By an able-bodied man is meant one who suffers under no personal inability, bodily or mental, to work." (Lord Justice-Clerk in *Petrie*, 1859, 21 D. 614 ; *Jack*, 1860, 23 D. 173.) [But a lad of sixteen, under no personal inability, but out of employment owing to a strike, and whose only surviving parent was a pauper, has been held entitled to relief. (*Beattie*, 1880, 7 R. 907.) The able-bodied wife of a pauper lunatic is not entitled to relief. (*Scott*, 1880, *ib.* 1047.)]

1960. The fact of the pauper being possessed of a small pittance, such as an annuity from a charitable association or the like, will not affect his claim, if it be inadequate to his support. But the reverse is the case if he either possess property or a vested interest, from the sale of which funds sufficient for his support can be realized ; or if he have relations in such circumstances as to be able, and in such near degree as to be bound, to support him. In the latter case, however, the pauper will be entitled to temporary relief pending an action against his relatives.

1961. *Relatives Bound to Relieve*.—As this subject has already been treated under the relations of Husband and Wife, and Parent and Child, a very brief recapitulation will here suffice.

1962. (1.) *A father* is bound to maintain his children, whether

legitimate or illegitimate, so long as they are unable to work, whether the incapacity proceed from infancy, disease, idiocy, or any other cause. This obligation extends to a daughter-in-law during her husband's life, but not after his death.

1963. (2.) The mother, but not the stepmother.

1964. (3.) The paternal grandfather, and other paternal ascendants.

1965. (4.) It was at one time thought that sons-in-law were not bound to support their parents-in-law, unless their wives had separate estates; but this doctrine is now exploded, and a son-in-law is held bound to support his wife's parents, on the principle that [by marrying her he has taken on himself the obligation incumbent on his wife, who is herself] liable for such support; but since the marriage prevents all action and diligence for relief against her, the obligation becomes good against the husband, who during the marriage is vested with the active title to the goods in communion. (Reid, 1866, 4 Macph. 1060.)

1966. (5.) Failing paternal ascendants, the burden of maintaining legitimate children falls on those of the mother.

1967. (6.) Children are liable to maintain their parents, and other ascendants; and in the unusual case of the pauper having both a father and a son capable of maintaining him, the burden lies primarily on the son. The offer of the son to receive the father into his family is not sufficient, if he is able to give him a separate aliment (Jackson v. Jackson, Nov. 17, 1825); but the reverse is the case where the father offers to receive the son.

1968. (7.) Collaterals are not bound to aliment each other.

1969. (8.) *Husbands*.—The highest of all obligations is that which lies on the husband to aliment his wife. We have already mentioned that husbands and fathers deserting their wives and children are liable to be prosecuted criminally, at the instance of the parish on whom the deserted wives or children have become a burden, under the late statute. (Sec. 80.)

1970. (9.) *Bastards*.—The parents are mutually bound to

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support illegitimate children ; the custody during infancy being with the mother.

1971. But the bastard is not bound to maintain his supposed father, and has no claim against his remoter ascendants,—not being, in the eye of the law, a member of their family.

1972. *Settlement*.—The law of settlement has given rise to so many questions of extreme nicety as to the construction of the late and previous statutes, that an incomplete statement of it would be likely only to mislead.

1973. The general rules are:—That children [during pupilary] follow the settlements of their parents, [legitimate children that of the father, illegitimate that of the mother,] and wives and widows those of their husbands ; that continuous, though not necessarily uninterrupted industrial residence for five years, gives a claim on the parish in which the industry has been exercised ; and that liability rests, in the last resort, with the parish in which the pauper was born. A birth settlement is acquired though the presence of the mother in that parish at the time of the birth may have been merely casual and temporary, as attending a market. (Craig, 1767, 39 Jur. 390.)

1974. On the desertion or death of the father, children follow the settlement of the mother : when a woman is married, her settlement is suspended, although her husband may not have any residential settlement in this country ; but a woman's settlement is not discharged by marriage.

1975. Besides increasing the period of residence from three to five years, the recent statute introduced another very important change, by declaring that it should be forfeited by mere non-residence and lapse of time ; whereas, by the former law, a residential settlement, once acquired, could never be lost, except by the acquisition of another. (Sec. 76.)

1976. The following is the well-known section of the Act by which the subject of residential settlements is regulated :—" Be it enacted, that from and after the passing of this Act, no

person shall be held to have acquired a settlement in any parish or combination by residence therein, unless such person shall have resided for five years continuously in such parish or combination, and shall have maintained himself without having recourse to common begging, either by himself or his family, and without having received or applied for parochial relief; and no person who shall have acquired a settlement by residence in any parish or combination shall be held to have retained such settlement if, during any subsequent period of five years, he shall not have resided in such parish or combination continuously at least for one year: Provided always that nothing herein contained shall be held to affect those persons who, previous to the passing of this Act, shall have acquired a settlement by virtue of a residence of three years, and shall have become proper objects of parochial relief." (Sec. 76.)

1977. The proviso at the end of the section has been held to apply only to paupers possessing settlements who were proper objects of relief at the date of the Act (4th August 1845)—that is to say, who either were on the roll, or entitled to be placed on it, at that date.

1978. *Funds for Supplying Relief*.—These arise from two sources: 1st, Voluntary contributions, mortifications, and the like; 2nd, Assessments.

1979. Though compulsory assessments were introduced so early as 1579, the principal fund for the relief of the poor, till a recent period, arose from voluntary contributions.

1980. But a change in this respect, which had been long in progress, has been operated of late with great rapidity. "So ample were the voluntary contributions of the people" (or so shameful the neglect of the poor?), says Mr. Smith (*Digest of the Poor Law*, first ed. p. 87), "that, prior to the year 1700, there were only three parishes assessed; and down to the beginning of the present century the number did not amount to one hundred." In 1845, when the Poor Law Act was passed, there

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were still only 230 assessed, and 650 unassessed; whereas in 1860 there were 749 assessed, and only 134 unassessed. [In 1883 there were 825 assessed and 61 unassessed.]

1981. *Church-door Collections* form the major part of the voluntary contributions for the relief of the poor.—By the proclamation of the Privy Council of 1693, it was ordained that one-half only of the sums collected at the church doors, or otherwise made by the kirk-session, should be paid into the general fund for the relief of the poor. No directions were given as to the application of the other half; but by almost invariable practice it had come to be applied to the purposes of occasional or temporary relief.

1982. On this subject it is enacted by the Poor Law statute (8 and 9 Vict. c. 83), that “in all parishes in which it has been agreed that an assessment should be levied for the relief of the poor, all moneys arising from the ordinary church collections shall, from and after the date when such assessments shall have been imposed, belong to and be at the disposal of the kirk-session of each parish: Provided always, that nothing herein contained shall be held to authorize the kirk-session of any parish to apply the proceeds of such church collections to purposes other than those to which the same are now, in whole or in part, legally applicable.” It is said that under this section the whole collections are now under the entire control of the kirk-session (Smith, p. 45); but the point seemed doubtful to Mr. Dunlop (p. 83), and it does not seem to have been formally decided.

1983. The practice, according to Mr. Smith, is in some cases to hand over the proceeds to the parochial board for disposal; but “in the great majority of instances, the sums collected are dispensed by the kirk-sessions themselves to the poor of their respective parishes. The persons so assisted, however, are for the most part of a different class from the poor actually chargeable to the parish, being generally individuals who have fallen

into temporary difficulties, or become otherwise fit objects of public charity ; but are in no true sense fit objects of parochial relief." (Smith, *ib.*)

1984. Where no assessment has taken place, the former arrangements with reference to the church-door collections remain in force.

1985. *Assessments.*—The 34th section of the Poor Law Act provides, that the parochial boards may resolve that the funds requisite for the relief of the poor shall be raised by assessment, and the 35th section prescribes *three* modes in which it may be raised.

1986. By the Valuation of Lands Act, 1854 (17 and 18 Vict. c. 91), a yearly roll of all subjects liable to public assessment is made up, and all subjects entered in this roll are liable to be assessed for poor-rates. The roll contains lands, houses, shootings and deer forests (if actually let), fishings, woods, copse, and underwood (if yielding revenue), ferries, piers, harbours, docks, canals, railways, mines, and quarries (if actually worked), coal works, water works, lime works, brick works, iron works, gas works, factories, and their pertinents. The yearly value is taken to be the value of the subjects taken one year with another, and not necessarily the actual rental ; but a reasonable deduction is allowed for repairs, etc. Canals and railways are assessed on the principle of the proportion which their annual value bears to their mileage within each parish. (Guthrie's *Bell's Prin.* 1136 B *et seq.*) Tramways are liable. (Craig, 1874, 1 R. 947.) Societies established exclusively for purposes of science, literature, or the fine arts (6 and 7 Vict. c. 36) ; ministers' manses and glebes (Forbes, 1850, 13 D. 341 ; *aff.* 1852, 1 Macq. 106) ; churches, chapels, and meeting-houses exclusively appropriated to public religious worship (which includes the holding of Sunday and infant schools and charity schools for the education of the poor) (28 and 29 Vict. c. 62) ; and Sunday and ragged schools (32 and 33 Vict. c. 40), are

exempt. So are lands in the occupation of the Crown, or of persons using them exclusively for its service; but universities are not exempt on this ground, or on that of being of no annual value. (University of Edinburgh, 1868, 6 M. H. L. 97.)

1987. *1st*, It shall be lawful for such board to resolve that one-half of such assessment shall be imposed upon the owners, and the other half upon the tenants or occupants of all lands and heritages within the parish or combination, rateably according to the annual value of such lands or heritages; or *2nd*, to resolve that one-half of such assessment shall be imposed upon the owners of all lands and heritages within the parish or combination, according to the annual value of such lands and heritages, and the other half upon the whole inhabitants, according to their means and substance, other than lands and heritages situated in Great Britain and Ireland; or *3rd*, to resolve that such assessments shall be imposed as an equal percentage upon the annual value of all lands and heritages within the parish or combination, and upon the estimated annual income of the whole inhabitants from means and substance other than lands and heritages situated in Great Britain or Ireland.

1988. The subsequent statute, 24 and 25 Vict. c. 37, repeals sec. 34 of the statute here referred to (8 and 9 Vict. c. 83), so far as it allows part of the poor's assessment to be levied on means and substance, leaving practically the method first prescribed as the only legal mode of assessment. It has since been decided that the assessment so imposed falls to be laid, one-half upon owners as a class, and the other half on occupants as a class. (Galloway, 1875, 2 R. 650.) Where such mode was in use, parochial boards are to meet within two months after the passing of the Act (July 22, 1861), and assess under the first mode of assessment in said 34th section.

1989. In addition to the modes thus offered to the option of parishes, it is provided that the assessment may continue to

be imposed according to any local Act or established usage, if approved by the Board of Supervision. (Sec. 35.)

1990. *Superintendents*.—By the Poor Law Amendment Act of 1856 (19 and 20 Vict. c. 117), the Board of Supervision is empowered to appoint two general superintendents to assist in the execution of the former Act; and such appointments have been made, and are now in operation.

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## CHAPTER XVI.

### OF THE EDUCATION OF THE PEOPLE.

1991. The provisions in regard to the education of the people in Scotland are contained in 35 and 36 Vict. c. 62, and 41 and 42 Vict. c. 78, the latter of which enacts that the two shall be read as one Act, and cited together as the "Education (Scotland) Acts, 1872 and 1878," the former being referred to as "the principal Act." The former statute proceeds on a preamble of the desirability of extending the means of education to the children of the whole people; and of leaving the choice of religious instruction to the parents, but without excluding it peremptorily from schools. Their provisions are summarized in the following sections:—

1992. *Board of Education*.—To assist the Scottish Education Department in the institution and organization of the new system a Board of Education for Scotland was established, whose tenure of office came to an end in August 1878, its functions as to election of school boards being now performed by the Education Department.

1993. *School Districts*.—The country is partitioned into school districts, which are either parochial or burghal, and whose limits and the conditions of whose constitution are prescribed by the Act, all decisions pronounced by the Board

in connection therewith being final, and not subject to review by the Court of Session except on allegation that it has exceeded its powers or neglected its duties. (Lochgilphead School Board, 1877, 4 R. 389; Renfrew Burgh School Board, 1877, 5 ib. 142.)

1994. *School Boards*.—For each of these districts a school board was ordered to be elected within twelve months, in accordance with the provisions of the Act. The number of members of each particular board is determined by the Education Department. They are not less than five or more than fifteen. The electors are all persons of lawful age, not legally incapacitated, entered on the last valuation roll of the district, made up not less than one month previously, as owners or occupiers of lands or heritages of the annual value of four pounds. Each voter has votes equal to the number of members to be elected, which he may distribute as he pleases. (Secs. 9–11.)

1995. The time which school boards remain in office is fixed by the Education Department with regard to the circumstances and convenience of each locality, so that an election may take place in each district as nearly as may be every three years, and not oftener. The time for elections is appointed by the Department by general order; and the retiring school board, at a convenient time before, are to take such steps as they may consider necessary, or as may be directed by the Department, for the next election. Should any election fail to take place as directed, the Department may order an election, or continue the existing school board in office, or nominate a fresh one, which shall have the same tenure of office, powers, and duties as one duly elected under the Act. A member of a school board may resign office on giving a month's written notice. Vacancies are to be filled up by the nomination of the board, the nominees going out of office at the same date as the board. Where the board fail for eight weeks to fill up a vacancy the right devolves

on the Education Department, who may either nominate or order the election of a person to fill it up. A member absent from six successive meetings, except from illness or other cause approved by the board, ceases to be a member. (Sec. 13, and 41 and 42 Vict. c. 78, secs. 15 and 16.)

1996. The candidates having the majority of votes are elected, and in case of equality the returning officer decides. Questions as to the election of candidates are to be determined summarily by the Sheriff on the petition of any one having a legal interest, and his determination is final. (Sec. 14.) In the case of an invalid election, leaving the board with less than its full number of members, the board itself, if a quorum—three—have been duly elected, fill up the vacancies. If a quorum does not exist, or if the vacancies are not filled up within three weeks, the Education Department may order a new election of as many as are required to complete the number. If, after a valid election, by death, resignation, or disqualification of members, there ceases to be a quorum, the Department may either nominate or order the election of the required number. (Sec. 15, and 41 and 42 Vict. c. 78, sec. 17.)

1997. Powers are given to the Education Department to adapt the provisions of the Act to the changing requirements of particular localities. It may, any time after three years from the passing of the Act, order the election of school boards for burghs which have not previously had any, and fix the limits of the school district so formed, which then becomes a burgh in terms of the Act. Or it may, after the lapse of the same time, discontinue a school board in any burgh or town, the burghal school district in this case becoming for educational purposes incorporated in the parochial one in which it is situated. Such orders are if possible to be framed to come into operation at the next school board election. (Secs. 18, 19.)

1998. *Constitution of School Boards.*—Each school board at its first meeting appoints a chairman for the period of its tenure

of office, who has a deliberative and a casting vote. Three members form a quorum. School boards are bodies corporate with perpetual succession and power to acquire and hold land for the purposes of the Act. They may appoint and remove managers (who may be selected from their own number), being not less than three, for the management of schools under their charge, and to whom they may delegate all their powers except that of raising money. (Secs. 21, 22.) No person holding an office of profit under a school board is eligible or capable of acting as a member or manager. (41 and 42 Vict. c. 78, sec. 21.)

1999. All parish or burgh schools existing at the passing of the Act, and all which may subsequently be supplied, are declared public schools, and are vested in the school boards of the districts in which they are situated, the board coming in the place of, and succeeding to the functions of, the former managers, whether minister and heritors, or town council and magistrates, or other authorities. The visitational powers of presbyteries are abolished; and it has been held not to be clear on the face of the statute that these powers have passed to the school board. (Kelso School Board, 1874, 2 R. 228.) Every school under a parochial school board is a parish school, and every school under a burghal school board is a burgh school. (Secs. 23-25.) Sec. 23, dealing with parish schools, vests teachers' houses and land attached in the school board, while sec. 24, dealing with burgh schools, mentions only "schools." Under the latter section it has been held that the word school includes schoolmaster's house when under the same roof, and that a school board depriving a master under section 60 (*infra*, § 2007) is entitled to summary warrant of removal. (Whyte, 1874, 1 R. 1124.)

2000. *Duties of School Boards.*—It is the duty of school boards from time to time to ascertain the educational requirements of their districts, and the extent and quality of the

existing provisions for supplying them, and to supply efficient means of education for all persons resident in their districts. The school accommodation need not necessarily be within the district, provided it be so situated as to be *available* for those resident there. Determinations of school boards for increase of accommodation must be reported to the Education Department for approval, which may also of its own accord direct such increase in any district, and institute inquiries with that view. In estimating the educational accommodation of their districts, school boards must take account of existing schools, public and private, available for those resident there; for which purpose powers are given them to call up information from the teachers, managers, and other officers of such schools, and to make inspection thereof, and to make returns of particulars to the Department as from time to time may be required of them. Schools where information and inspection are refused are not to be taken into account. (Secs. 28-35.)

2001. The next duty of school boards is to maintain in efficiency the schools under their management, and to provide such additional accommodation as the Education Department may at any time consider necessary. On failure, after a requisition by that authority, they may be summarily compelled to do so by the Court of Session at the instance of the Lord Advocate. (Lord Advocate *v.* School Board of Stow, 1876, 3 R. 469.) In carrying out these purposes, school boards may, with the sanction of the Department, discontinue or change the sites of schools, and sell and dispose of school land and buildings. They may further, in performance of their duties under the Act, in virtue of powers conferred to that effect for public purposes by the Lands Clauses Consolidation Act, 1845 (which, and the Acts amending it, are by the Act of 1878 (sec. 31) declared to be incorporated therewith, and a form of procedure provided for putting their powers in force), purchase sites for school buildings, buy or take on lease existing schools, and enlarge schools. (Secs. 36, 37.)

2002. *Finance and Parliamentary Grant.* — Every school board has a school fund, out of which all expenses must be paid, and a treasurer. (Secs. 43, 48.) This fund consists of (1) money voted by Parliament (sec. 67); (2) money raised by loan, in virtue of power given, with consent of the Education Department, to do so, and to spread the payment over not more than fifty years (sec. 45); (3) school fees, fixed by the school board, and payable to the treasurer (sec. 53); (4) proceeds of sale of school buildings (sec. 36); (5) fines recovered from defaulting parents. (Sec. 70.) Deficiencies in the school fund are to be supplied by the imposition of a local rate, levied along with the poor's assessment, or where there is none, or where it is not laid one-half on owners and one-half on occupiers, directly by the school board, and in any case in the same manner as poor's assessment. (Sec. 44.) [A parish minister is assessable for school-rate in respect of his manse and glebe. (Hogg, 1883, 7 R. 986.)] Bequests in behoof of public schools existing at the date of the Act become vested in the school boards, and they are authorized to receive and administer bequests that may be made in the future. (Secs. 46, 47; School Board of Peebles, 1874, 1 R. 686.)

2003. The distribution of the Parliamentary grant is regulated by the Education Department, which draws up and issues codes of rates and conditions. In doing so no annual grant is to be made in respect of religious instruction, or in respect of any new denominational or non-public school, unless they are satisfied that such school is required in the district, regard being had to the religious beliefs of those residing there. (Sec. 67.) The conditions of obtaining the Parliamentary grant for elementary schools are altered by the Elementary Education Act, 1876, which, except in this provision, does not apply to Scotland. (39 and 40 Vict. c. 79.)

2004. *Teachers.*—The vested rights of all teachers in office at the passing of the Act, "with respect to tenure of office,

emoluments, or retiring allowance," are reserved. [(Doak, 1884, 11 R. 574.)] The appointment of teachers belongs to the school boards. Salary and tenure of office and the provision of houses and gardens to teachers are at the pleasure of the school board, or according to contract. (Secs. 54, 55.) A master who at the passing of the Act was in receipt of a fixed salary and the school fees, and who was then voluntarily paying an assistant, whose place was afterwards supplied by an assistant appointed and paid by the school board, was held entitled to retain his full salary and the school fees so long as the school remained on its former footing. (Fraser, 1877, 4 R. 892.)

2005. [A supplementary Act has been passed to regulate the dismissal of teachers. It provides that a school board cannot dismiss a teacher unless they have passed a resolution to do so at a meeting called three weeks previous to the dismissal, by circular sent to each member, and unless notice of the motion of dismissal has been sent to the teacher at least three weeks before the meeting. The resolution must be passed by a majority of the whole board. The board has power, however, summarily to suspend a teacher; but the suspension does not affect his right to salary. (45 and 46 Vict. c. 18. See Hinds, 1883, 10 R. 930.)]

2006. All teachers must hold certificates of competency, certain qualifications being held equivalent thereto at the passing of the Act. Certificates are conferred by the Education Department, after examination, according to regulations issued, and by examiners appointed by it. A degree of a British university dispenses with examination in the subjects embraced in the degree, but every candidate must satisfy the Department of his skill in the theory and practice of teaching. (Secs. 56-59.)

2007. Teachers appointed before the Act may be removed at the instance of the school board, either by sentence of the Sheriff, for immorality or cruelty, or improper treatment of the

scholars under their charge; or, on report to that effect by the school inspector, for incompetency, the teacher so removed having the same right to retiring allowance as that provided by the Parochial and Burgh Schools Act, 1861, for teachers removed for inefficiency, arising from old age or infirmity, but without fault. A copy of the report must, before proceeding to give judgment, be served on the teacher, and the judgment be confirmed by the Education Department. (Sec. 60.) [The Court have held that as, prior to the Act, *burgh* schoolmasters did not hold office *ad vitam aut culpam*, but were removable by the magistrates and town council upon any reasonable ground, and as their powers have passed to the school boards, the latter may remove such a schoolmaster without resorting to the special powers of removal conferred by sec. 60. (Mitchell, 1883, 10 R. 982.)] The Court have also held that a teacher who could, under the Act of 1861, have claimed a retiring allowance, if removed for old age or infirmity,—the only causes for which under that Act he could have been removed without fault,—might under this section be removed for other causes without fault, and might therefore be entitled to an allowance. At a further stage, however, the allowance was refused in respect of the peculiar circumstances of the case. (Robb, 1875, 2 R. 417 and 698.) The judgment of the school board removing a teacher for fault is final, and not subject to review in a court of law. (Morrison, 1875, 2 R. 715; [Marshall, 1879, 7 R. 359]) Any teacher may, with permission of the school board, retire on an allowance. (Sec. 61.)

2008. *Parliamentary Franchise*.—Sec. 24 of the Act of 1878 set at rest what had been, since the passing of the prior Act, a vexed question of election law, by enacting that it should be no objection to the name of any teacher of a public school who holds office under a school board, and who occupies lands and heritages under it, being placed on the register of voters for the

burgh or county within which such lands and heritages are situated, that the latter are occupied by him as part of the emoluments of his office, and at the pleasure of the board, provided that the rental thereof, according to the valuation roll, be sufficient to qualify a voter. School boards have access to the valuation roll free of charge. (Sec. 25.)

2009. *Higher Class Schools*.—Higher class schools—by which are meant burgh schools in which the education given does not consist chiefly of elementary instruction, but of instruction in Latin, Greek, modern languages, mathematics, natural science, and generally in the higher branches of knowledge—are to be managed exclusively by the school boards of their respective burghs, with a view to promote the higher education of the country, who are for that purpose, as far as practicable, to relieve them of the necessity of giving elementary instruction to young children by providing a sufficient number of elementary schools elsewhere in the burgh. The funds of these schools, consisting of contributions from the common good of the burghs—by sec. 46 directed to be paid to the school boards—endowments, and fees, do not go into the school fund, but are administered exclusively for the benefit of the schools to which they belong. The fees are fixed by the teachers, with approval of the school board, and payable to the former. The teachers in such schools are not to be examined like those in the elementary schools, but their qualifications are to be fixed by the school board, and they are to be examined by the professors of a university, or teachers of distinction in another higher class school. These schools are to be examined annually, at times fixed by examiners appointed by the school board; or (41 and 42 Vict. c. 78, sec. 20) the school board may apply to the Education Department, who appoint inspectors to examine the school. The expenses of examination, and of the maintenance of the buildings of higher class schools, are to be paid out of the school fund. Any parish school giving such instruction in

the higher branches as reasonably to be deemed a higher class school may be dealt with in like manner. Certain schools are scheduled as higher class schools at the passing of the Act, and power is given to school boards to convert any school in a parish or burgh into a higher class school. (Secs. 62-64.)

2010. *Inspection*.—Every school is open at all times to Government inspection, but no inspection or inquiry into religious instruction is permitted. (Sec. 66.)

2011. *Conscience Clause*.—Every school is open to children of all denominations, and parents may regulate what religious instruction, or none, their children shall receive in the school, and such instruction can be given or observance practised only at the beginning and end of any meeting of the school for elementary instruction, which practically leaves not more than four distinct times a day for that purpose. (Sec. 68.)

2012. *Compulsitor*.—Every parent must provide elementary instruction for his children between the ages of five and thirteen in reading, writing, and arithmetic. If “unable from poverty” to pay the school fees, he must apply to the parochial board, whose duty it is to do so on being satisfied of the parent’s inability. (Sec. 69; [Ferrier, 1881, 9 R. 30].) Should the parochial board refuse to pay the fees, the school board may obtain an order on it from the Sheriff to do so. (41 and 42 Vict. c. 78, sec. 22.) Parents failing to educate their children, to ascertain whom an officer is appointed by every school board, may be prosecuted by such officer, and condemned in a fine of one pound or fourteen days’ imprisonment; and if continuing to disobey, may be proceeded against at intervals of one month (41 and 42 Vict. c. 78, sec. 28); the expenses, so far as not recovered from the parent, to come out of the school fund. (Sec. 70.) A parent living in a Highland parish three and a half miles from the nearest school, neglecting to send a girl of five years’ old that distance to school, and having no other means of education, was held not to have failed in the sense of

the Act. (Campbell, 1877, 4 R. C. J. 17.) Employers of children under thirteen are to be treated like defaulting parents if they keep them in their employment after notice from the school board, but without exempting the parent from liability. A certificate of ability to read and write from an inspector frees parents and employers from liability to prosecution. (Secs. 69-73.)

2013. The Act of 1878 makes detailed provisions for the education of children employed in works or in casual employment, prohibiting the employment of any child under the age of ten, or under fourteen without the production of certain certificates of school attendance. These belong rather to factory and workshop legislation than to the present subject. A school board may exempt from the prohibitions of the Act children employed in casual employment, which is defined in the Act, and also children above the age of eight, for the necessary operations of husbandry and the ingathering of the crops, or to give assistance in the fisheries, provided the period or periods of such exemption do not exceed on the whole six weeks in one year. The provisions of the Act regarding the employment of children are to be enforced by every school board in its district, its enforcement on employers being the part of the inspectors under the Factory and Mining Acts, to assist whom in doing so, with information or otherwise, is the duty of school boards. School board officers may, on obtaining an order to that effect from the Sheriff, at any time within forty-eight hours from its date, enter any place where children are believed to be employed in contravention of the Act for purposes of examination. Any one refusing them admittance is liable in a penalty of twenty pounds. Employers of children and parents who employ their children in contravention of the Act, are liable, on summary conviction, in a penalty of forty shillings, but are exempt on showing that it was due to the guilt of some other person, such as that of an agent or workman engaging the child, or of a

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parent producing a forged certificate of birth, and that he himself used all due diligence to enforce its provisions. When such right of exemption is shown to the satisfaction of the school board, they are to proceed against the agent, workman, or parent, who has thus incurred a like liability. (Secs. 5-13.)

2014. *Supervision*.—All school boards must make reports and returns from time to time, as required by the Education Department, by whom the whole proceedings are laid before Parliament. (Secs. 74, 6, 75.)

## BOOK III.

### OF THE MACHINERY OF THE LAW.

2015. An outline of the legal rights and obligations of Scotchmen having now been presented to the reader, as they affect, *first*, the members of the same family, and *second*, the members of the general community in their private relations, we have now to consider briefly, in the *third* place, the methods by which these rights and obligations are ascertained in particular cases, and the means by which they are enforced by the State.

2016. All rights and obligations are ascertained, if doubtful or disputed, by obtaining a decree of a competent court of law, and they are enforced by diligence or execution, that is to say, by calling in the executive power of the State to support and vindicate the decree. The humblest judicature is on a footing of equality with the highest, to the extent of being entitled to vindicate its lawful authority *vi et armis*, that is to say, by calling in the aid of the military, in the last resort.

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#### CHAPTER I.

#### OF THE SUPREME COURTS AND JUDGES OF SCOTLAND.

##### I. THE COURT OF SESSION.

2017. The Court of Session is the highest civil tribunal in Scotland. It was instituted in the reign of King James v., by an Act of Parliament, bearing date the 17th May 1532, for the purpose of discharging the judicial functions which had originally belonged to the King and his council, and which, since the

year 1425, had in a great measure devolved on a committee of the Parliament itself, as the great Council of the nation.

2018. The new Court consisted originally of fourteen ordinary judges, half spiritual and half temporal,<sup>1</sup> and a president, who in the first instance was a churchman, and who was appointed to act as chairman, except when the Lord Chancellor was present.

2019. The King reserved to himself the privilege of appointing other lords or members of his great Council, to the number of three or four, to sit and vote with the Lords of Session.

2020. The office of Chancellor of Scotland was abolished at the Union in 1707 ; and the habit of appointing peers to take part in the deliberations of the judges has long since fallen into abeyance, though, when a peer chanced to be present, he is still accommodated with a seat on the bench, as a mark of respect.

2021. From its foundation, down to the year 1808, the Court of Session consisted of one tribunal. In that year, in consequence of the great "extension of agriculture, commerce, manufactures, and population," it was divided into two separate courts, called Divisions, with co-ordinate jurisdiction. (48 Geo. III. c. 151.) The Lord President, who continued to enjoy the rank and dignity of President of the whole Court, and who still discharges very important functions in that capacity, with seven of the ordinary judges, formed the First Division, and the Lord Justice-Clerk, with six of the ordinary lords, the Second Division.

2022. In 1810, the three junior ordinary judges of the First Division and the two junior ordinary judges of the Second Division were relieved from attendance in the Inner House, and appointed to sit as permanent Lords Ordinary in the Outer House ; the quorum in either Division, which had formerly been four, being now reduced to three.

<sup>1</sup> The practice of appointing churchmen to the bench did not cease immediately after the Reformation.—Erskine, i. 3. 13.

2023. In 1830 the number of judges of the Court of Session was reduced to thirteen (1 Will. iv. c. 69); and the present staff consists of the Lord President, the Lord Justice-Clerk, and eleven ordinary judges.

2024. Of these thirteen judges, four sit in the First Division of the Inner House, viz. the Lord President and three ordinary judges; four in the Second Division of the Inner House, viz. the Lord Justice-Clerk and three ordinary judges; and the remaining five judges officiate in the Outer House as Lords Ordinary,—four sitting daily at the same time, though each in a separate court, and the fifth having what used to be called a “blank day.” The blank days are now abolished, but the Outer House judges are in rotation to sit one day in each week for the purpose of hearing proofs, or presiding at trials by jury in causes depending before them respectively; and on these days ordinary business is not to be transacted.

2025. All ordinary cases are tried in the Outer House in the first instance. The jurisdiction of the Outer House is subordinate to that of the Inner House, except where it has been specially provided by Act of Parliament that the judgment of a Lord Ordinary shall be final.

2026. The last appointed Lord Ordinary officiates in what is called the Bill Chamber, a department of the Court in which summary petitions and applications, and other branches of business requiring unusual despatch, are disposed of; such as suspensions of decrees or of diligence, and suspensions and interdicts of threatened wrongs. An interim interdict, by which the proceeding complained of is arrested till its true nature can be inquired into and discussed by both parties, is granted on the applicant making out an *ex facie* case of injury to the satisfaction of the Lord Ordinary, and becoming responsible for any injury which may be occasioned by the interdict, should it be ultimately recalled. In general, he has also to find caution for the expenses of the process.

2027. The Bill Chamber is open in vacation,—the judges, with the exception of the Lord President and Lord Justice-Clerk, and Commissioners of Justiciary, officiating in rotation.

2028. "In the event of the judges of either Division of the Inner House being equally divided in opinion on a question of fact arising upon a proof, or upon a cause which in their opinion does not involve any legal principle of importance, it shall be competent for such Division to appoint the cause to be reheard before the judges of the said Division, or such of them as shall be able to give attendance in Court on the day appointed, with the assistance of such additional judge or judges to be afterwards named by the president or judge presiding in the Division as shall make up the number of five judges." The judgment to be pronounced shall be in conformity with the opinion of the majority of the judges present, and shall bear to be the judgment of the Division by which the hearing was appointed. (31 and 32 Vict. c. 100, sec. 59.) This provision does not abrogate any existing provisions for rehearing of causes in the Inner House. It is therefore still competent to the judges of either Division, in any cause in which they shall be equally divided in opinion, to direct such cause to be reheard and judged by the judges of the Division before which it depends, "with the addition of three judges of the other Division of the Court." (13 and 14 Vict. c. 36, sec. 35.) There seems to be no incompetency in ordering cases falling within sec. 59 of the statute of 31 and 32 Vict. to be heard in accordance with the provisions of the earlier statute. But if such a hearing were to take place, it is thought that a rehearing in the manner described in the next paragraph could not be obtained.

2029. By the statute of 31 and 32 Vict., it is also provided (sec. 60), that, in cases of equal division of opinion, and in cases of difficulty or importance not falling within sec. 59, and which might, according to the practice existing at the passing of the Act, have been set down for hearing before seven judges, it

shall be competent to have a hearing before seven judges, three or four being called in to make a quorum. The judges so called in need not be Inner House judges. It is also competent in such cases to direct printed papers to be laid before such judges, who shall thereupon give their opinions in writing. In cases of great difficulty and importance, a hearing *in presence*, as it is called,—*i.e.* a discussion before the whole thirteen judges,—may be ordered; and this is the most solemn proceeding by which a cause can be disposed of in Scotland.

2030. By sec. 8 of the Court of Session Act it is “competent for the Court from time to time, by Act of Sederunt, to appoint any four Lords Ordinary to meet as a Court, at such times as shall be specified in Act of Sederunt, for the purpose of hearing and disposing of such causes standing on the rolls of the First and Second Divisions of the Inner House, not being causes which have come into the Inner House by reclaiming note against the judgment of a Lord Ordinary;” the senior Lord Ordinary to preside and sign the judgment, which has the same effect as that of one of the Divisions.

2031. *The judges of the Court of Session* hold their office *ad vitam aut culpam*. They are appointed by the Crown. No one is eligible who has not served as an advocate or principal clerk of Session for five, or as a writer to the signet for ten years. In practice, the judges are invariably chosen from the bar.

2032. *Jurisdiction*.—As the Court of Session was not intended for the decision of trifling causes, the general rule is, that no action for debt can originate in that Court in which the sum sued for is under £25. Where the action is one not having conclusions for a pecuniary sum, it may be competently brought in the Court of Session, though the interest of the pursuer may not be of the value of £25. No suspension or advocacy of a judgment of an inferior court is competent, where the value to the pursuer (not including expenses, but including interest, if concluded for) is less than £25. In all questions of personal

status, and competitions relative to heritage, as well as declarators of right to it, the Court of Session has a privative jurisdiction.

2033. In other cases, the judgments of all the inferior courts of Scotland, except the Small Debt Courts, are subject to review in the Court of Session. There are, however, many statutory exceptions.

2034. Reviews of the decisions of inferior courts is now obtained in all cases where, according to the former practice, advocacy was competent by way of appeal to either Division of the Court. The appeal is now heard only in the Inner House. (31 and 32 Vict. c. 100, sec. 67.) In such appeals it is now not necessary to find caution for expenses, but the inferior court may regulate in the meantime all matters relating to interim possession. (*Id.* sec. 79.) It is competent to appeal until after the expiration of six months from the date of final judgment, unless the extract has been issued in the meantime. (*Id.* sec. 67.)

2035. The judgments of the Inner House of the Court of Session may be reviewed in the House of Lords.

2036. It is incompetent to appeal directly from the interlocutor of a Lord Ordinary, unreviewed by the Inner House.

2037. Unless there are reasonable grounds for delay, a petition of appeal must be presented in the House of Lords within two years after decree in the Court of Session; and it must be signed by two counsel, who must certify that, in their opinion, the appeal is not groundless.

2038. *Questions of Fact*.—However it may have stood in former times,<sup>1</sup> there can be no doubt that, from the institution

<sup>1</sup> The view that in Scotland, as in all the other nations of Europe, jury trial existed at a very early period, has been supported by legal antiquaries on very plausible grounds. Ivory's *Forms of Process*, vol. ii. p. 259 *et seq.*, and works there referred to; see also Mr. Innes's *Scotland in the Middle Ages*, p. 189.

of the Court of Session in 1532 till the institution of the Jury Court in 1815 (55 Geo. III. c. 42), the judges of Session were judges of fact as well as of law ; and their original number of fifteen, corresponding to that of a Scottish criminal jury, is supposed to have been fixed upon in order that they might represent the Parliament in its capacity of the great jury of the nation.

2039. *Law and Equity*.—The distinction between law and equity in the English sense has never been admitted in Scotland ; and the judges of the Court of Session are consequently judges of both.

2040. The *College of Justice* includes not only the judges who are properly styled senators, but advocates, clerks of Session, writers to the signet, and all other practitioners and officials connected with the Court of Session, including the Court of Exchequer.

2041. Till recently, the members of the College of Justice were exempted from almost all local taxes and burdens, and possessed many other privileges,—all of which have now been either voluntarily relinquished or withdrawn by statute.

#### OF THE OTHER DEPARTMENTS OF THE COURT OF SESSION.

##### 1. *The Jury Court.*

2042. From its institution in 1815, down to the year 1830, the Jury Court was a judicial establishment altogether separate from the Court of Session.

2043. It consisted of one chief and two ordinary judges,—the latter being at the same time judges of the Court of Session. Their title was, “The Lords Commissioners of the Jury Court in Civil Causes.”

2044. The object of the Jury Court was to dispose of such questions of fact as might be remitted to it from the Court of

Session, or the Court of Admiralty, which then also existed as a separate tribunal.

2045. The whole arrangements of the Jury Court were borrowed from England, even to the number of the jury itself, —which is still twelve in place of fifteen, as in the criminal jury of Scotland,—and the necessity for an unanimous verdict, which has only been abolished within the last few years. (17 and 18 Vict. c. 59 (1854).)

2046. As the first statute (55 Geo. III. c. 42 (1815)) by which it was introduced was regarded merely as sanctioning an experiment, it was declared to have force for only seven years.

2047. Four years afterwards, a second Act was passed (59 Geo. III. c. 35 (1819)), which, proceeding on the preamble that “the extension of trial by jury to civil causes has been attended with beneficial effects to the administration of justice,” permanently established the Court, and enlarged the sphere of its jurisdiction.

2048. The institution was further enlarged, and altered in some respects, in 1825. (6 Geo. IV. c. 120.)

2049. In 1830 (1 Will. IV. c. 69), the Jury Court was incorporated with the Court of Session, and it is now to be regarded merely as the department of that Court in which questions of fact are disposed of.

2050. Jury trials, however, differ from the other branches of business in the Court of Session in this, that they may take place in any circuit town, either before one of the judges of the Court of Justiciary (who are always judges of Session also) when on circuit, or before any other judge or judges of the Court of Session whom either Division may appoint.

2051. Any question of fact which emerges in the course of an action may be sent to a jury; but the classes of cases specially appropriated to jury trial are the following:—All claims for damages on account of injuries done to the person; for libel or defamation; for injury to moveables or lands where

the title is not in question ; for breach of promise of marriage, seduction, or adultery ; and all actions founded on delinquency, or *quasi* delinquency, of any kind, where the conclusion is for damages or expenses only. (59 Geo. III. c. 35, sec. 1.) To this list were subsequently added (6 Geo. IV. c. 120, sec. 28) actions against shipmasters, carriers, innkeepers, and stablers ; all actions for nuisances ; for reduction of deeds on the ground of incapacity on the part of the grantor ; all actions on policies of insurance, charter-parties, bills of lading, and the like ; and actions for the wages of seamen. Causes determined by the Court of Session, and appealed, are sometimes remitted by the House of Lords, with instructions to send issues to a jury.

2052. In 1850, several very important changes were made in the arrangements for determining questions of fact in the Court of Session. By the "Act to facilitate Procedure in the Court of Session" (13 and 14 Vict. c. 36) of that year, it is provided (sec. 46) that, "if the parties in a cause in which an issue has been adjusted shall consent to the Lord Ordinary before whom the cause depends trying such issue without a jury, such Lord Ordinary shall, unless the Court, on the report of such Lord Ordinary, shall deem it inexpedient and improper, try such issue without a jury." Within eight days after the proceedings at the trial are concluded, the Lord Ordinary is directed to pronounce an interlocutor, stating "specifically what he finds in point of fact." Such findings in fact may be brought by either party before the Lord Ordinary himself for reconsideration, and he may either correct them or order a new trial ; but they can be submitted to the review of the Inner House only on the ground that he has committed an error in law.

2053. By the statute 29 and 30 Vict. c. 112, sec. 1 (The Evidence (Scotland) Act, 1866), it is enacted, that "it shall not be competent in any cause depending before the Court of Session to grant commission to take proof ; but where in such causes it was prior to this statute competent to take proof by

commission, and where proof had been allowed, a diet of proof may be appointed, either in session or vacation, in the discretion of the Lord Ordinary, at which the evidence shall be led before the Lord Ordinary. The Lord Ordinary may himself take down the evidence or dictate it to a clerk, and cause it to be taken down and recorded by a writer skilled in shorthand writing. Where a shorthand writer is used, the Lord Ordinary may dictate to him the evidence which he is to record."

2054. By section 2 of this Act, it is made competent (1) to either Division of the Court, or to the Lord Ordinary, to grant commission to any person competent to take and report in writing the depositions of havers; (2) upon special cause shown, or with consent of both parties, to grant commission to take evidence in any cause in which such commission might, prior to the Act, have been granted; (3) to grant commission to take and report in writing the evidence of any witness who is resident beyond the jurisdiction of the Court, or who, by reason of age, infirmity, or sickness, is unable to attend the diet of proof. It is also provided that the Act is not to affect the practice in regard to granting commissions for taking, before a proof has been allowed to lie *in retentis*, the evidence of aged and infirm witnesses.

2055. In order to extend the benefits of arbitration, and in some measure to combine them with those of jury trial, it is provided (6 Geo. iv. c. 120, sec. 50) that parties, by consent, may refer any issue to one, three, five, or seven arbiters, who shall be sworn, and act in every respect as a jury. No new trial is to be granted on the ground of miscarriage in fact; and if granted for error in law, it is appointed to take place before the same arbiter or arbiters.

2056. *The Verdict*.—The statute to which we already referred (31 and 32 Vict. c. 100, sec. 48) provides that "a jury may at any time, being not less than three hours after it has been enclosed, return a verdict by a majority of its number." By the

statute 17 and 18 Vict. c. 59, a verdict could not be returned under a period of six hours unless the jury were unanimous. After the lapse of that period a verdict might be returned if nine of the jury were agreed.

## 2. *The Court of Exchequer.*

2057. The ancient Court of Exchequer, like the modern Jury Court, has recently been absorbed by the Court of Session.

2058. In 1856 it was enacted that the "whole power, authority, and jurisdiction belonging to the Court of Exchequer in Scotland shall be transferred to, and vested in, the Court of Session, and the Court of Session shall be also the Court of Exchequer in Scotland."

2059. As the previous constitution of the Court of Exchequer has thus become a matter of mere historical interest, a very brief notice of it will suffice.

2060. By the Treaty of Union, in 1707 (Art. 19), it was provided that the Revenue Court of the Kings of Scotland should continue to exist as then constituted, till a new Court could be established by an Act of the Parliament of Great Britain. This object was effected almost immediately (6 Anne, c. xxvi.), and the new Court of Exchequer came into operation on the 1st May 1708. It was formed after the model of the Court of Exchequer in England; and the judges were appointed to be the High Treasurer of Great Britain, with a Chief Baron, and four Barons, who were to be either serjeants-at-law, or English barristers, or Scotch advocates of five years' standing. All barristers were entitled to practise before this Court who could plead either in the Courts at Westminster or in the Court of Session.

2061. The Court of Exchequer, as thus constituted, had privative jurisdiction as to the duties of customs, excise, and other revenues appertaining to the King or Prince of Scotland, and as to all honours and estates which might accrue to the

Crown, in which matters the forms of procedure used in the English Court of Exchequer were, under certain limitations, to be adopted. Of these limitations the most important was, that no debt due to the Crown should affect the debtor's real estate in any other manner than as such estate might be affected by the laws of Scotland.

2062. Where trial by jury took place, it was appointed that the number of jurors should be twelve, as in England.

2063. The judgments of the Court of Exchequer were carried to the House of Lords by the English form of writ of error.

2064. The whole superintendence of the feudal property of the Crown in Scotland was also entrusted to this Court; and, as a necessary consequence, the duty of revising and passing the titles of the King's feudal vassals.

2065. The Court further acted as a board for controlling and auditing the accounts of the revenue.

2066. This latter branch of the duties of the Court was transferred to England in 1832, and all accounts relating to the revenue were appointed to be examined, comptrolled, and audited by the Comptroller and Auditor of Excise of the United Kingdom. (2 and 3 Will. iv. c. 103, 11th August 1832.) It was declared that the jurisdiction of the Exchequer as a court of law should not be affected by this statute, and that all debts, duties, and revenues of customs or excise should be recoverable as heretofore.

2067. By a previous Act of the same year, however, that series of changes was commenced which afterwards issued in the abolition of the Court of Exchequer as a separate court. In imitation of the Act (1 Will. iv. c. 69) for abolishing the Jury Court, and uniting jury trial in civil causes with the ordinary jurisdiction of the Court of Session, and in further pursuance of the principle of simplifying and reducing the judicial establishments of Scotland which that enactment had introduced, it was now provided (2 Will. iv. c. 54, 23rd June

1832), that no successor be appointed to the Chief Baron, or to the one ordinary Baron whom the Act just mentioned had substituted for the four who constituted the original Court; and that, on their decease or retirement, their duties should devolve on a judge of the Court of Session, who should be entitled to an addition to his salary of £600 a year.

2068. The recent Exchequer Act (19 and 20 Vict. c. 56 (1856)), by which the Court of Exchequer became in reality the revenue department of the Court of Session, thus effected little more than had been previously determined on. But several important changes in the mode of procedure were introduced for the first time. The English forms and terminology hitherto used in the Court of Exchequer were assimilated to those of the Court of Session; and it was provided that interlocutors in Exchequer causes pronounced by the Lord Ordinary, on whom the chief duties were now devolved, may be reclaimed against to the Inner House, and that Inner House judgments in Exchequer causes may be carried to the House of Lords by appeal, as if they had been pronounced in ordinary Court of Session causes. It had previously (18 and 19 Vict. c. 90 (1855)) been enacted, that costs may be given either for or against the Crown; but the old preference of the Crown over other creditors was retained, and the "privilege of audience," as it is called, or the right to be heard last, was preserved to the Lord Advocate when pleading on behalf of the Crown, whether before the Court or a jury.

### 3. *The Teind Court.*

2069. The judges of the Court of Session sit in the Teind Court every second Monday during session, in the capacity of Parliamentary commissioners for the valuation of teinds, and for their application to the support of the Established Church and clergy of Scotland. Five judges, being Commissioners of Teinds, of whom the Lord Ordinary in teind causes shall be one,

unless he is unavoidably absent, now constitute a quorum of the Teind Court. (31 and 32 Vict. c. 100, sec. 9.)

2070. In 1617 a commission of the Parliament of Scotland was appointed to plant churches and modify stipends for the Reformed clergy out of the tithes of every parish in the kingdom. Other commissions were subsequently appointed with the same object, and with additional powers. They were authorized to unite and disjoin parishes, to value and sell tithes, to augment stipends, to build new churches, and the like.

2071. By the Act of Union, in 1707, the powers of the last of these commissions, and of all the previous commissions, were transferred to the judges of the Court of Session.

2072. The Teind Court, though it meets in the same place, and is presided over by the same individuals, is nevertheless distinct from the Court of Session, having a special jurisdiction, and a separate establishment of clerks and other officials.

2073. The judgments of the Court of Teinds may be carried by appeal to the House of Lords.

2074. The Teind Court has no power to enforce its own decrees. This is done by the intervention of the Court of Session.

2075. By the Judicature Act of 1825 (6 Geo. iv. c. 120, sec. 54) a distinction was drawn between the ministerial and the judicial functions of the Court of Teinds. The former, comprising all the discretionary powers formerly vested in the Court, were left on the previous footing; whilst the latter, in all their departments, were transferred to the Court of Session, and are now conducted, as far as possible, like ordinary actions. They are allotted to the Second Junior Lord Ordinary, whose judgments are subject to review in the Inner House.

#### *4. The Ancient Court of Admiralty.*

2076. The ancient Court of the High Admiral (1681, c. 16, and 1690, c. 15), who was the King's Justice-General upon the

seas, possessed supreme jurisdiction, both civil and criminal, in all strictly maritime and seafaring causes. In civil cases this Court possessed power to review its own decrees, but its judgments could not be carried by advocacy to the Court of Session. In criminal cases, even where the crime had been committed on shipboard, if it was not an offence against the laws of navigation, the jurisdiction of the Court of Admiralty was cumulative with that of the Court of Justiciary. Piracy and mutiny on shipboard were thus exclusively cognisable in the Court of Admiralty, whilst murder even at sea might be competently tried in the Court of Justiciary.

2077. This cumulative jurisdiction of the Court of Justiciary was, in 1828, extended to "all crimes and offences whatsoever now competent to be tried in the Court of Admiralty." (9 Geo. iv. c. 29, sec. 16.)

2078. In 1830 (11 Geo. iv. and 1 Will. iv. c. 69), the Court of Admiralty was abolished. Its civil jurisdiction in cases exceeding £25 was transferred to the Court of Session, whilst those under this amount became competent in the inferior courts. A corresponding arrangement was made regarding its jurisdiction in crimes; those of a serious nature being handed over to the Court of Justiciary, while those of a lighter sort were made competent in the Sheriff Courts.

2079. By the Judicature Act (6 Geo. iv. c. 120, sec. 68), in 1825, the jurisdiction of the High Court of Admiralty in Scotland, in questions of prizes and captures, had already been vested in the High Court of Admiralty in England.

2080. The duties of the Lord High Admiral were in practice performed by a deputy, who was called the Judge of the High Court of Admiralty.

##### 5. *The Ancient Commissary Court.*

2081. The Supreme Commissary Court, which held its sittings in Edinburgh, consisted originally of four judges. It

was established by a royal grant of Queen Mary, dated February 8, 1563, and had jurisdiction in actions of divorce, declarators of marriage, nullity of marriage, and all actions which originally belonged to the Bishops' Ecclesiastical Courts.

2082. Its powers having been gradually conjoined with those of the Court of Session, it was finally abolished in 1836 (6 and 7 Will. iv. c. 41); what remained of its jurisdiction, which has been still further abridged by two subsequent statutes (13 and 14 Vict. c. 36 (1850), and 21 and 22 Vict. c. 56 (1858)), being vested in the Sheriff of Edinburgh.

2083. In 1823 (4 Geo. iv. c. 97) the inferior commissariots, which had usually been commensurate with the dioceses, were abolished, and each county was declared to constitute a commissariot, the Sheriff being commissary, excepting the Sheriffdoms of Edinburgh, Haddington, and Linlithgow, which continued to constitute the commissariot of Edinburgh.

2084. By the Judicature Act (1 Will. iv. c. 69), the counties of Haddington and Linlithgow were erected into separate commissariots.

2085. "The jurisdiction now left to the Commissary Courts in Scotland," says Mr. Alexander, "is limited to discerning and confirming executors to deceased persons having personal property in Scotland, and relative incidental matters, such as applications for the protection of the property of the deceased till an executor is confirmed, the exoneration of executors and their cautioners, applications for restriction of caution, and the appointment of factors for minors *quoad* executry funds."<sup>1</sup> The Commissary Court, as a separate court, is now abolished, and its whole powers and jurisdiction transferred to the Sheriff Court. (39 and 40 Vict. c. 70, sec. 35.)

<sup>1</sup> Practice of the Commissary Courts in Scotland, 1858. To the first chapter of this work the reader is referred for a very interesting sketch of the history, constitution, and jurisdiction of the Commissary Courts.

### 6. *The Valuation Appeal Court.*

2086. By the Lands Valuation Act (20 and 21 Vict. c. 58, sec. 2), a court of two judges was appointed for the hearing of appeals from decisions of the assessors under the Act. As amended by 30 and 31 Vict. c. 80, sec. 8, this court now consists of any two judges of the Court of Session named from time to time by Act of Sederunt. These judges form a supreme court whose judgments are not subject to review by the Court of Session, even on the ground of excess of jurisdiction, any more than those of the Court of Justiciary. (Stirling, 1873, 11 M. 480.)

### 7. *The Registration Appeal Court.*

2087. By the Registration of the People Act, 1868 (31 and 32 Vict. c. 48, sec. 23), a court of three judges of the Court of Session, appointed from time to time by Act of Sederunt, one judge to be named from each Division and one from the Outer House, was constituted for the hearing of appeals from the judgments of Sheriffs in Registration Courts for counties and burghs.

## II. OF THE HOUSE OF LORDS.

2088. As the highest court of appeal in civil causes, the House of Lords, in its judicial capacity, may be reckoned amongst the Courts of Scotland.

2089. During the existence of the Scottish Parliament there was much difference of opinion, and several very serious disputes arose, as to the competency of appeals, on the ground that the Court of Session was itself in theory a committee of Parliament.

2090. The right to "protest for remeid of law to the King and Parliament," however, was formally recognised by the Convention of Estates at the Revolution; and though, strangely

enough, no provision was made at the Union for appeals to the British Parliament, the right of the subject was held by implication to remain intact in this as in other respects; and, consequently, the duty of dispensing justice in the last resort, which had formerly rested with the Parliament in Scotland, was regarded as transferred to that of Great Britain.

2091. Shortly after the Union, accordingly, the forms in use in appeals from the English and Irish Courts of Equity were adopted in Scotch causes; and in 1709 it was provided, in conformity with the English practice, that execution of the sentences of the Court below should be arrested whilst appeals were pending.

2092. Till the recent changes, there were three Courts in Scotland, the judgments of which might be carried directly to the House of Lords,—the Court of Session, the Court of Exchequer, and the Court of Teinds. The amalgamation of the Exchequer with the Court of Session (*ante*, p. 501) has now reduced their number to two.

2093. As to Court of Session cases, the general rule is, that none but final judgments of the Inner House, exhausting the whole merits of the cause, are subject to appeal; but where leave is given by the Court, or where the judges have differed in opinion, it is competent to bring even interim, or interlocutory judgments as they are called, before the House. When the latter class of judgments are appealed from, the existence either of one or other of the reasons we have mentioned must be certified by two counsel who conducted the case in the Court of Session.

2094. There is no appeal from the sentences of the Court of Justiciary, nor from the verdict of a jury, even in a civil cause; though, in the latter case, it is competent to bring the directions of a judge in point of law under review of the House of Lords.

2095. The judgments of the House of Lords are carried into execution by presenting authentic copies of them to the Court of Session, with a petition praying that they may be applied by

that Court. The procedure is then regulated by the forms of the Court of Session.

2096. The House of Lords as a Court of Appeal for the three kingdoms is now reconstituted by 39 and 40 Vict. c. 59, but the competency of appealing from Scotch Courts remains the same as before.

### III. OF THE COURT OF JUSTICIARY.

2097. The High Court of Justiciary is the Supreme Criminal Court of Scotland. It was constituted, in its present form, in 1672. (1672, c. 16.)

2098. Its president is the Lord Justice-General, an official to whom the criminal jurisdiction formerly vested in the King's Justiciar was confided after the institution of the College of Justice. Until recently, the office of Justice-General was held by a nobleman, who was not necessarily a lawyer; but it has now been conjoined with that of Lord President of the Court of Session. (11 Geo. iv. and 1 Will. iv. c. 69, sec. 18.) In the absence of the Lord Justice-General, the Lord Justice-Clerk is president of the Court of Justiciary.

2099. Five other Lords of Session, appointed to act as Lords Commissioners of Justiciary, constitute the ordinary judges of the Court. By the Act 31 and 32 Vict. c. 95, sec. 1, "the Lord Justice-General, Lord Justice-Clerk, or any one Lord Commissioner of Justiciary, may preside alone at the trial of any panel before the High Court of Justiciary, and when so presiding shall constitute a quorum of said High Court, provided that in any trial of difficulty or importance it shall be competent for two or more judges of Justiciary to preside thereat." Until the passing of this statute the High Court of Justiciary could not be composed of a less number of judges than three.

2100. The Lord Advocate,<sup>1</sup> the Solicitor-General, and four

<sup>1</sup> A very interesting historical notice of the office of Lord Advocate in Scotland, by the late Lord Medwyn, will be found in King's Advocate

Advocates-depute, act for the Crown as prosecutors in the Court of Justiciary. The private party injured may also prosecute in his own name ; but this mode of proceeding is nearly unknown in Scotland beyond the precincts of the Police Court,—crimes in all the higher criminal courts being almost invariably prosecuted by the public officers of the Crown.

2101. Trials in the Court of Justiciary are always conducted with the aid of juries, which consist of fifteen men, in place of twelve as in England, and in civil cases in Scotland ; and their verdicts are returned by a majority, which is also at variance with the English practice. The verdict of “not proven” is another feature in which the criminal law of Scotland differs from that of England.

2102. It is competent for the jury to return a special verdict—that is, to find certain facts proven, leaving it for the Court to determine whether or not they amount to the crime charged ; but verdicts of this kind are now very rarely resorted to. The practice of the jury writing out their own verdict before delivering it has now been abolished ; it being found that much ambiguity is avoided, and the object of the jury more satisfactorily attained, by entrusting that duty to the clerk of Court. But written verdicts may still be resorted to on the direction of the Court, in the case of the jury remaining in deliberation for an unusual time. Where the written verdict is resorted to in such circumstances, it is sealed up by the jury, who are then at liberty to disperse. (9 Geo. iv. c. 29, sec. 15.) But in practice the verdict is almost always delivered by the foreman of the jury orally ; it is then committed to writing by the clerk, under the eye of the judge, and read over to the jury for their approval.

2103. No appeal lies to any Court from a decision of the  
*v. Lord Douglas*, Dec. 24, 1836, 15 Shaw, p. 325. See also, on the subject of a public prosecutor of crimes, Montesquieu, vol. i. p. 108 ; Grotius, de Jur. Bel. et Pac., Lib. I. iv. sec. iv. 2 ; Hume's Criminal Law, vol. ii. p. 127 ; Berenger, de la Justice Criminelle, cap. iv. p. 257 ; Thibaut, Instit., p. 167 ; Stephens' Com. ii. 617 and iv. 421.

Court of Justiciary ; and this applies not only to cases in which the decision is a fact arrived at with the aid of a jury, but to those in which it is a point of law determined by the Court. (Mackintosh, 1876, 3 R. H. L. 34.)

2104. Neither can the Court of Justiciary review its own judgments. It has the power of reviewing the decisions of all inferior criminal courts, though not to the effect of setting aside the verdict either of an inferior judge or of an assize, on the ground that it is contrary to evidence. It is regarded as the province of the jury in all cases, and their province exclusively, to weigh the evidence submitted to their consideration ; and no process is recognised in Justiciary similar to the very questionable one of setting aside a verdict as contrary to evidence in the civil courts. But it is the province of the Court, on the other hand, to decide whether the evidence laid before the jury was legal and competent ; and it will consequently inquire into the correctness of a decision of an inferior criminal court which is challenged on the ground of a witness having been erroneously received, an incompetent question put, or a document wrongly admitted.

2105. Except in those crimes which are punishable with death, or to which a statute has attached a particular punishment, the Court of Justiciary is invested with arbitrary powers, and may inflict any punishment, from fine to penal servitude for life.

2106. Peers are amenable to the Court of Justiciary for all ordinary crimes ; but for treason, or any other felony, they can be tried only by a Court of their own order, assembled by the Lord High Steward.

2107. It can neither try soldiers for military, nor clergymen for ecclesiastical offences.

2108. The Court has frequently asserted its authority to punish innominate offences, which, though clearly criminal in their character, have not been hitherto punished as crimes. This function, however,—treading, as it does, very closely on the borders of legislation,—is one which the Court exercises with very great caution.

2109. The Judges of Justiciary hold circuits twice a year, in spring and autumn ; and for this purpose Scotland is divided into a Southern, a Western, and a Northern District. (1672, c. 16.)

2110. The Southern Circuit is held at Jedburgh, Ayr, and Dumfries ; the Western at Glasgow, Inveraray, and Stirling ; and the Northern at Dundee, Perth, Aberdeen, and Inverness. A third Circuit Court for the Western District, for the despatch of criminal business only, is held at Glasgow during the Christmas recess. [By Act of Adjournal in 1881 following on an Order in Council, additional circuits were appointed for Glasgow at such times in October, February or March, and June or July, and for Perth, Dundee, and Aberdeen, at such times in January or February, and June or July, as the Court might from time to time fix.]

2111. Two judges are usually present in a Circuit Court, but it is competent for one to sit and despatch business. At Glasgow the work is divided between two courts sitting simultaneously, with one judge in each.

2112. There is no appeal from a Circuit Court ; but the Court itself may certify a case commenced before it to the whole Court of Justiciary for consideration.

2113. Till 1853 the Circuit Courts exercised an important though limited civil jurisdiction ; appeals to them from certain of the inferior courts being competent, when the sum in dispute did not exceed £25. The decision of the judges in these cases was final. But the Sheriff Court Act (16 and 17 Vict. c. 80, sec. 22) has restricted this power of review to cases under the Small Debt Act not exceeding £12. These appeals are competent only on the grounds of malice or oppression on the part of the inferior judge, incompetency, including defect of jurisdiction, or such deviations from the statutory enactments as the Court may think took place wilfully, or have prevented substantial justice from being done. Besides the appeal allowed in small debt cases, there is an appeal allowed on the same ground

to the Circuit Court of Justiciary, or, where there is no Circuit, to the High Court, by a number of police, procedure, and local Acts. There is also a provision to the same effect in the Public Houses (Scotland) Amendment Act, 1862.

2114. In determining whether ordinary offences, such as theft, shall be tried by the supreme or by the inferior criminal courts, the officers of the Crown are guided quite as much by the number of previous convictions against the prisoner as by the extent or character of the offence then under consideration.

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## CHAPTER II.

### OF THE INFERIOR COURTS OF SCOTLAND.

#### I. OF THE SHERIFF COURT.

2115. *Sheriff*.—Notwithstanding its accidental resemblance to an Arabic title of honour, the name as well as the office of Sheriff is unquestionably of Teutonic origin. The name is derived from the Saxon words *Schir*, a division or section of the country, a shire, from *scheran*, to divide, cut or shear; and *Gerefa*, the same as the German word *Graf*, a prefect or comes, from the Saxon *reafan*, to levy or seize,—the Gerefa having been probably a fiscal officer. From the latter word comes also the *reve* of former, and the *greve* of present times.

2116. As regards the office, it is believed (Kemble's Saxon in England, ii. p. 151) that in Anglo-Saxon England the Scirgeréfa acted as the deputy of the Ealdorman or Earl, presided in his absence in the County Court (*scirwitan*), and sometimes acted as his legal assessor, both in that assembly and when he chanced to preside in his court as a civil or criminal judge; and it would seem that he stood in the same relation to the bishop, and performed the same functions in his court. In Scotland the corresponding duties were discharged by the King's Sheriff; it

having been enacted at a very early period, that "neither bishops nor abbots, nor yet earls nor barons, nor any freeholder, shall hold their Court unless the King's Sheriff or his servants be there, or summoned to be there, to see that the court be righteously led;" and also that barons, knights, and freeholders, and the stewards of bishops, abbots, and earls shall attend the Sheriff's court, which is to be holden at the beginning of every forty days. (Assise Reg. Willel. Scots Acts, Thomson's ed., pp. 53, 55, and Reg. Maj. iv. 11; Innes's Scotland in the Middle Ages, p. 55; Balfour's Practicks, 15 *et seq.*)

2117. It is probable that Sheriffs were known in Scotland from the commencement of what has been called the Scoto-Saxon period of our history (Chalmers' Caled. i. p. 715), and that one of the many legal reforms of David I. consisted in extending them over the country (preface to Acts of Parliament, Thomson's ed., p. 31; Assise Reg. David, ib. pp. 7, 9). Down to the war of the succession, the officers of the law, like the law itself, were for the most part identical in the two countries. There were coroners, and mayors, and aldermen in Scotland as well as in England; who, after the French connection, gave place with us to provosts and procurators-fiscal.<sup>1</sup> The change was a very gradual one, the old titles, as will be seen from the statutes, being retained long after the new ones were introduced, and continuing, indeed, almost to the time when the English connection was restored by the accession of James VI. (1424, c. 42; 1426, c. 71 and c. 75; 1436, c. 139; 1449, c. 21.) The crowner continued down to a late period (1528, c. 5; 1535, c. 34), and the alderman to a still later (1540, c. 89 and 91). The title of the Sheriff was retained in Scotland, but by degrees his functions, which originally were no doubt the same as in England, underwent various changes.

2118. When our authentic statute law commenced with the

<sup>1</sup> See a treatise on the office of Procurator-Fiscal in Riddell's Peer. and Con. Law, p. 1002.

reign of James I., the three officers by whom a county was governed, irrespective of the King's Justiciars, the Lords of Regality and Barons, with their Bailies or Sheriffs, were the King's Lieutenant, the King's Sheriff, and the Sheriff's Depute.

2119. In 1438 (c. 3), the Lieu-tennent is spoken of as an existing officer, and commanded to "raise the country" whenever it may be necessary to bring the rebellious and unruly possessors of castles and fortalices into subjection; and in 1449 (c. 10) it is enacted, that where the Sheriff's decrees are resisted he may denounce the parties openly to the Lord Lieu-tennent, whilst, on the other hand, if the Sheriff refuse to do his duty, the party spulzied (plundered) may complain of the Sheriff to the Lieu-tennent, in which case the Lieu-tennent shall deal with the Sheriff as the Sheriff ought to have dealt with the spulziers. In the Act which immediately follows, the Sheriff is spoken of as the King's Sheriff, and empowered to carry the provisions of the preceding Act into effect within the regalities or jurisdictions held in connection with lands.

2120. From these enactments it appears (1) that the King's Sheriff, as distinguished from the Sheriffs or Bailies of the Lords of Regality, was an officer appointed by the Crown; and (2) that though in some respects subject to the authority of the King's Lieutenant or Warden (1581, c. 81), he was not his depute. The Lord-Lieutenant, like the old Commissioners of Array in England, was perhaps only a temporary officer, constituted in times of danger, or placed over districts which were actually disturbed; and it seems certain that his functions, like those of the Great Constable, and the Constables of the King's Castles, were executive rather than judicial, though, like them (Jeffrey's Roxburghshire, vol. ii. pp. 45, 47, 48), he may occasionally have exercised the powers of the Sheriff, or overruled his decisions. When the King had occasion to appoint a Lieu-tennent for a particular shire, it is natural to suppose that he would generally

choose the *Comes*, or lord of the district; and the term *Vice-Comes*, by which our early Latin writers always designate the Sheriff, would seem to indicate that a more intimate relation than that which afterwards prevailed, subsisted originally between the offices of Lord-Lieutenant and Sheriff. At present they are entirely independent.

2121. *Sheriff-depute*.—The office of Sheriff having very early become hereditary (Ryley's *Placita*, 504; Chalmers' *Caled.* i. 715; Innes's *Sketches of Early Scottish History*, pp. 399 and 465), and continuing to be so, notwithstanding the provisions of the Act 1455, c. 44; it became necessary to provide that if any Sheriff was unable or unapt to use and exercise his office in person, he should present to the King "ane sufficient depute," for whom he shall be answerable. (Skene, *de verborum significatione*, and Acts quoted, *voce* Schireff.) These deputies, as well as their clerks, the Sheriffs were enjoined to send yearly, on 1st November, to the Lords of the Session, to be examined and admitted by them. It thus appears that the office of the original Sheriff-depute corresponded very nearly to that of the modern Sheriff-substitute; and in this position matters remained till the passing of the Heritable Jurisdictions Act in 1747.

2122. By that enactment (20 Geo. II. c. 43) the hereditary Sheriffs were abolished, and their judicial powers transferred to officers to be appointed by the Crown. These newly created Sheriffs were to hold their offices at first for a period of seven years, and afterwards *ad vitam aut culpam*. But the Crown retained the power of appointing Sheriffs for one year (sec. 5), who should exercise no jurisdiction (sec. 30), but who were to be known by the name of Principal or High Sheriff,—titles previously unknown to the judicial nomenclature of Scotland.

2123. The honorary office thus created, probably in imitation of the English High Sheriffship, was occasionally combined with that of Lord-Lieutenant, when that office was placed on a new footing by the Militia Acts. (42 Geo. III. c. 90, 91.) But the

only practical result of its existence seems to have been, that it led to the term *depute* being retained by the officers henceforth entrusted with the jurisdiction which formerly had belonged to the hereditary Sheriff. The custom which thus arose has fallen into disuse since the passing of 9 Geo. iv. c. 29, sec. 22, which provides that the Sheriff-depute may be addressed by the title of Sheriff, without the term *depute* being added.

2124. The officer now called the Sheriff, formerly known, for the reasons just explained, as the Sheriff-depute, and sometimes, in violation of 20 Geo. II. c. 43, sec. 30, called, even in Acts of Parliament, Sheriff-Principal, to distinguish him from the Sheriff-Substitute, must be a member of the bar of at least three years' standing. Practically, he is always of much older standing. He usually resides in Edinburgh, and continues to practise as an advocate. He is bound by Act of Parliament to hold certain stated sittings within his county every year. (16 and 17 Vict. c. 80, sec. 46.) The Sheriffs of Edinburgh and Lanark are resident, and do not continue to practise at the bar.

2125. The Sheriff's jurisdiction within his own district, both in civil and criminal matters, was at first very nearly as extensive as that of the King's Justiciar over the whole kingdom. Even previous to the institution of the College of Justice, however, various causes conspired to limit it, and on that event it assumed pretty nearly the dimensions which have since belonged to it.

2126. At present the civil jurisdiction of the Sheriff extends to all personal actions,—on contracts, bonds, bills, or other personal obligations, to whatever extent,—to actions of damages, actions for rent, furthcomings, poindings of the ground, etc. He may also judge in possessory actions connected with land rights to the greatest extent; but questions of heritable title, whether tried by declaratory or rescissory actions, were, previous to 1877 (see next section), competent only in the Court of Session; as are also actions relative to personal status—*e.g.* declarators of

marriage, nullity of marriage, divorce, separation *a mens et rebus*, legitimacy, etc., which are now privative to the Court of Session, as coming in place of the Commissaries of Edinburgh.

2127. By the Sheriff Courts Act of 1877 (40 and 41 Vict. c. 50) the jurisdiction of the Sheriff has been extended to all questions of heritable right or title (including actions of declarator, but excluding actions of adjudication, except so far as formerly competent, and actions of reduction); and also to actions of division of commonry, and division, or division and sale, of common property, where the value of the subject in dispute does not exceed £50 by the year, or £1000 in value. Such actions must be raised in the Sheriff Court of the county where the property in dispute is situated. His jurisdiction is also extended to actions of declarator relating to property, or right of succession in moveables where the value does not exceed £1000; and to any action against a foreigner which would be competent against a Scotsman amenable to his jurisdiction, if his ship has been arrested within the Sheriffdom. (Sec. 8.) The defender in any such action may, at any time within six days after closing the record, have it transmitted to the Court of Session. (Sec. 9.) The Sheriff himself has power to determine the value of the subject in dispute, and his determination is final as to the competency of the action in his Court. (Sec. 10.)

2128. The Sheriff has extensive duties entrusted to him by the Bankruptcy statutes, to which is now added the process of *cessio bonorum*, which must now be instituted in the Sheriff Court in the first instance; and he has many other incidental duties, both judicial and ministerial, to perform, to which allusion will be made in the following pages.

2129. By the Sheriff Courts Act of 1876 (39 and 40 Vict. c. 70) important changes were made in the forms of procedure in Sheriff Courts in civil causes, which it would be beyond the limits of this work to do more than indicate here. Instead of

the old form of summons, actions in the Sheriff Court now commence with a petition, which may be written or printed, or both, and for which the Act gives a form. It is to contain no statement of the grounds of action, and to have appended a short statement of facts and a note of pleas in law. The *induciae* on a petition are seven days for Scotland and fourteen for Orkney and Shetland, or furth of Scotland, except where shorter *induciae* were formerly in force; and the Sheriff may shorten them where he sees fit. Sheriffs' warrants may now be executed edictally. A party having a known residence or place of business in England or Ireland may be cited or charged by posting a copy of the writ in a registered letter to that address. (Secs. 6-9.) The procedure throughout the action is simplified and partly assimilated to that in the Supreme Court, and special forms of procedure are directed in multiplepointings and processes of *cessio*. (Secs. 25, 26.)

2130. Appeals to the Sheriff are competent only against final judgments, or against interlocutors—(1) granting or refusing interdict, interim or final; (2) granting interim decree for money, or making an order *ad factum præstandum*, or sisting an action; (3) allowing, or refusing, or limiting the mode of proof; (4) when the Sheriff-Substitute has given leave to appeal. An appeal submits to review the whole judgments and interlocutors in the cause: it cannot be abandoned by the appellant without leave, and may be insisted in by any party to the cause. (Secs. 27-29.)

2131. Sec. 12 of the Act of 1877 abolishes fees to Sheriffs for presiding at inquiries as to the value of lands taken for public purposes under 8 and 9 Vict. c. 19, sec. 51, and for examining bankrupts under 23 and 24 Vict. c. 80, sec. 12, with power to the Treasury to grant compensation.

2132. The criminal jurisdiction of the Sheriff within his county was formerly almost unlimited. Latterly, what are called the four pleas of the Crown—viz. murder, robbery, rape,

and wilful fire-raising—have been considered competent only in the Court of Justiciary.

2133. The Sheriff cannot pronounce a sentence of transportation; and his jurisdiction from very early times has been confined within the limits of his county. (Skene, *de verborum significatione*, v. Schireff; Balfour's *Practicks*, p. 17.) But to these rules there are some partial exceptions. The Prison Act of 1839 (2 and 3 Vict. sec. 27) extended the Sheriff's jurisdiction to the effect of enabling him to send prisoners sentenced to one year's imprisonment or upwards to the General Prison at Perth; and by the recent Lunatics Act (20 and 21 Vict. c. 71, sec. 85), he is empowered, in case there shall be no asylum within his jurisdiction, to commit dangerous lunatics to an asylum in an adjoining county. Doubts have even been entertained whether another section of the statute (sec. 34 (1857)) does not extend this power to the granting of orders for admission into asylums on medical certificates, in cases where there is no such immediate necessity for interference.

2134. Crimes of a serious kind are tried by the Sheriff with the aid of a jury; the circumstances in which this mode of trial, or the summary one before himself, are to be made use of, being for the most part either prescribed by statute or by the Acts of Adjournal of the Court of Justiciary. It is not considered "safe to try any case without a jury, where the charge is of such a kind as to warrant, if proved, more than sixty days' imprisonment." (Barclay's edition of M'Glashan's *Sheriff Court Practice*, p. 11.)

2135. The ordinary prosecutor in the criminal courts of the Sheriff is the Procurator-Fiscal (*ante*, p. 512), who stands to them very much in the same relation that the Lord Advocate does to the Court of Justiciary. The Procurator-Fiscal is now appointed by the Sheriff with approval of one of the Principal Secretaries of State.

2136. *Sheriff-substitute*.—This title was introduced into Scot-

land by 20 Geo. II. c. 43, sec. 29, in consequence of the title of Sheriff-depute being retained by the successor of the hereditary Sheriff, as explained above.

2137. In each county there is at least one Sheriff-substitute, who was formerly appointed by the Sheriff, but now since 1877 by the Crown, on the recommendation of one of the Principal Secretaries of State. He is removable only by the same power for inability or misbehaviour upon a report by the Lord President and the Lord Justice-Clerk.

2138. Not more than two Sheriffs-substitute additional to those existing at the date of the passing of the Sheriff Court Act (15th August 1853) may be appointed in each county, on authority granted by the Crown on the joint recommendation of the Lord President, the Lord Advocate, and the Lord Justice-Clerk, provided that the recommendation shall expressly bear that the appointment is essential for the public service. (16 and 17 Vict. c. 80, sec. 37.)

2139. The Sheriff-substitute must be either an advocate, a writer to the signet, a solicitor before the Supreme Courts, or a procurator before a Sheriff Court, or any person "entitled to practise as an agent in any court of law in Scotland," of not less than five years' standing. (40 and 41 Vict. c. 50, sec. 4.) Of late years Sheriffs-substitute have been mostly chosen from the bar.

## II. SHERIFF SMALL DEBT COURTS.

2140. The Sheriffs and Sheriffs-substitute, though not the exclusive, are now the most frequent judges in those courts in which the smaller kind of civil actions are disposed of.

2141. In small debt actions, the prosecutor and defender state the facts of the case verbally to the judge, and adduce proof where necessary. The intervention of an agent is inadmissible except with permission of the judge, and the cause of granting leave must be set forth. When the statements and

proofs are concluded, the judge for the most part gives a decision at once, in presence of the parties, and in open court, stating his reasons more or less in detail as he may see expedient. Should he consider his information to be defective, however, in point of fact, or wish to consider the points of law which may have arisen, he may adjourn the cause.

2142. No record is kept either of the statements or of the proof; the names of the parties and the sums decerned for being all that is committed to writing. The decisions in this form are entered in a book kept by the clerk of Court, and subscribed by the judge. These decisions are final; that is to say, they are not subject to the review of any court on the merits.

2143. The appeal to the Justiciary or Circuit Court, formerly mentioned, is competent only on the ground of corruption, or malice and oppression, or on such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from being done, or on incompetency, including defect of jurisdiction of the Sheriff. By these provisions, parties in small debt causes before the Sheriff are effectually protected from being brought into expensive processes before the Supreme Court on mere questions of form.

2144. By the Sheriff Court Act (16 and 17 Vict. c. 80, sec. 26 (15th August 1853)), the jurisdiction of the Sheriff's Small Debt Court was raised from £8, 6s. 8d. to £12. The Small Debt Act of 1837 (1 Vict. c. 41, sec. 23) rendered imperative the holding of Circuit Small Debt Courts by the Sheriffs or their substitutes in every county, at the times and places mentioned in the Schedule to the Act. The frequency of these judicial visits varies according to the amount of business at the different places; the greatest number being twelve, and the smallest two. The times and places of holding these Courts may be changed by the Sheriff, with consent of one of Her Majesty's Principal Secretaries of State.

2145. By the Act 30 and 31 Vict. c. 96, it is provided that it shall be lawful for the Sheriff to try in a summary way all actions of debt that are competent in his Court for house maills, men's ordinaries, servants' fees, merchants' accounts, and other the like debts, wherein the debt, exclusive of expenses and dues of extract, shall exceed £12, but shall not, exclusive as aforesaid, exceed £50 in value. If the procedure provided by this Act be resorted to, the pursuer shall, in the event of the debt being of greater value than the sum sued for, be held to have passed from, and abandoned the remainder. The Sheriff has power to send the case, if in his opinion it be one of difficulty, to the ordinary roll. In cases decided upon disputed facts, under this Act the Sheriff is bound to take notes of the evidence if requested to do so by either of the parties; in the event of no such notes being taken, there is no appeal allowed against the judgment of the Sheriff except on matters of law. After final judgment is pronounced, there is, subject to the limitation mentioned, an appeal in all cases to the Sheriff if the case had been tried by the Sheriff-substitute in the first instance. But if the case has been tried by the Sheriff in the first instance, or has been heard by him on appeal from the Sheriff-substitute, there is an appeal, subject to the same limitation, in all causes exceeding in value £25 sterling, to either Division of the Court of Session. The appeal must be noted in the interlocutor sheets within eight days of the date of the Sheriff's judgment, or in cases before the Sheriff Court of Orkney and Shetland, within sixteen days.

2146. The recent alterations which have been made in the law of evidence in Scotland have greatly facilitated the conduct of business in these courts. Witnesses are now "admissible notwithstanding relationship to the party adducing them" (3 and 4 Vict. c. 59); they are not "excluded by reason of crime" (15 and 16 Vict. c. 27), though they may be examined on any point affecting their credibility (*ib.*); either party may be examined either for or against himself (16 and 17 Vict. c.

20); and an agent in a cause may be examined, "even though he shall at the time when he is so adduced be acting as agent" (ib.).

2147. The only exceptions still retained to the now almost universal admissibility of witnesses are, that neither parties themselves, nor their husbands or wives, shall be competent or compellable to give evidence in criminal proceedings in which they are accused, nor to answer questions in a civil suit tending to criminate themselves or each other, or to reveal matters which they have communicated to each other during marriage.

2148. The small debt jurisdiction of the Sheriffs has arisen merely as a substitute for the summary jurisdiction formerly vested in justices of the peace and magistrates of burghs; and the extent to which it has been increased since its first institution, little more than thirty years ago, is the best proof of the benefits which it has conferred on the public.

### III. SHERIFF'S POLICE COURT.

2149. In Edinburgh the Sheriff has, by special statute, a police jurisdiction, which is cumulative with the ancient jurisdiction of the civic authorities.

2150. The Sheriff's Police Court there performs criminal functions which correspond in many respects to the civil functions which belong to the Small Debt Courts; and its jurisdiction is, for the burgh, almost identical with that of the Sheriff's Summary Courts for counties. No record is kept of the evidence in the Police Court. The period of imprisonment which may be there awarded is limited to sixty days.

### IV. BURGH COURTS.

2151. "Magistrates of boroughs have the cognisance of debts and questions of possession between the inhabitants; and it is

the general opinion that royal boroughs have as extensive a civil jurisdiction within the borough as the Sheriff hath in his territory." (Erskine, B. i. tit. iv. sec. 21.) Though this jurisdiction, even where it has not been transferred to the Sheriff, has in a great measure fallen into disuse, courts for the disposal of civil cases are held by the magistrates in all the burghs of Scotland. Where the criminal jurisdiction of the magistrates is cumulative with that of the Sheriff, as in Edinburgh, the burgh is itself a sherifffdom. In some burghs the magistrates are constituted by their charter justices of the peace;<sup>1</sup> in which case they have, within their bounds, a jurisdiction similar to that of the county justices in the rest of the county.

2152. Special justices of the peace for the city of Edinburgh are now appointed under the Police Act.

2153. In Edinburgh the magistrates are admirals of the ports of Leith and Newhaven; and their jurisdiction extends half-way across the Firth of Forth, and embraces "all maritime affairs and actions." Latterly this jurisdiction has been confined to a superintendence which the magistrates exercise over the dredging of oysters.

#### V. DEAN OF GUILD'S COURT.

2154. The Dean of Guild is the head of the Guild Brethren, or Merchant Company of the city. Formerly he was a judge in such mercantile and maritime causes as arose within the burgh, but he has long ceased to exercise jurisdiction in these matters. It still belongs to him, however, to "take care that buildings within burgh be agreeable to law, neither encroaching on private property nor on the public streets or passages; and

<sup>1</sup> By the Act 1587, c. 82, by which justices of the peace were originally appointed, it was provided that "four of the council of every burgh" should be justices.

that houses in danger of falling be thrown down." The Dean of Guild exercises his authority in a Court of which he is either the sole or the principal judge. (Ersk. i. 4. 25.)

2155. No building within the old or extended royalty of Edinburgh can be erected, or taken down, or materially altered, without a warrant from the Dean of Guild Court, which is only granted after the neighbouring proprietors of the applicant and others interested have been cited, and had an opportunity of being heard for their interests. The Dean of Guild's jurisdiction does not extend to that portion of the burgh brought under the magistrates' jurisdiction by a recent statute. (19 and 20 Vict. c. 32, sec. 3 (1856).)

#### VI. JUSTICE OF PEACE COURTS.

2156. The office of Justice of the Peace is of English origin.

2157. It was introduced into Scotland in the reign of King James VI., by the same statute (1587, c. 82) by which circuits for the despatch of criminal business were instituted; and the justices were entrusted with the double duty of bringing offences of the graver sort before the judges, and of trying and disposing of those of a more venial kind "at their courts and meetings to be kept four times every year." These courts were the origin of our present Quarter Sessions. But it was during the Protectorate of Cromwell that the office was put on its present footing. The rules by which it has ever since been regulated were prescribed by an Act which was passed immediately after the Restoration (1661, c. 38), and in which the Instructions of the previous year were embodied.

2158. By the Eighteenth Article of the Treaty of Union, the justices of the peace in Scotland were invested with the same powers in matters connected with excise and customs which were previously possessed by the justices in England; and by

a subsequent statute (6 Anne, c. 6, sec. 2) their criminal jurisdiction was also assimilated to that of the English justices ; the Scottish forms of trial, however, being retained.

2159. The commission by which justices of the peace are appointed falls by the demise of the Crown.

2160. Several officials—such as the judges of the Court of Session, the Lord Advocate, and the Solicitor-General, and all Sheriffs and Sheriff-substitutes—are included in every commission of the peace.

2161. No solicitor or procurator in any inferior court can act as a justice of the peace. (6 Geo. iv. c. 48, sec. 27.) By a recent statute (19 and 20 Vict. c. 38) it is provided that where any such person shall be elected to the office of Magistrate or Dean of Guild in a burgh, the Magistrates or Dean of Guild of which are *ex officiis* justices of the peace, he shall be entitled to act as a justice during his tenure of office, provided he, and any partner or partners he may have, shall cease to practise before any Justice of the Peace Court in the county within which the burgh lies.

2162. The antiquated form of commission still in use was drawn up in England in the thirty-third year of the reign of Queen Elizabeth (1590).

2163. No qualification of rank of property is required by a justice of the peace in Scotland, and he receives no pecuniary recompense. He is reimbursed by the county for the sums actually expended by him in the public service.

2164. The regular days for holding Quarter Sessions are, the first Tuesday of March, May, and August, and the last Tuesday of October.

2165. Petty Sessions are called when required by the clerk of the peace.

2166. Quarter Sessions have the power of reviewing the judgments of the justices in Petty Sessions.

2167. Two justices are a quorum ; though in some of the

larger counties it is a rule, that a greater number shall be present at Quarter Sessions.<sup>1</sup>

2168. One justice cannot act as a judge, though he may grant a warrant to apprehend an accused party, and bring him before himself for examination, or before a court of two or more justices for judgment. One justice may call the roll of causes, pronounce decrees in absence, receive returns of the execution of citations, grant warrants for citations *de novo* (6 Geo. iv. c. 48, sec. 15), and sign a summary warrant for recovery of poor-rates under the Poor Law Act, 1845. (Oakeley, 1867, 6 Macph. 12.)

2169. An appeal to the Circuit Court of Justiciary is competent both from the Petty and Quarter Sessions, when exercising their ordinary jurisdiction. Where they are acting under a statute, the existence or non-existence of an appeal is generally regulated by its provision. Where there is no provision, the right of appeal exists.

2170. The chairman of a bench of justices has no double vote; and in case of equality, one of the justices retires, or another is called in.

2171. The judicial powers of justices of the peace are restricted to the county for which they are appointed; but they may receive affidavits, ratifications by married women, and the like, anywhere in Scotland—these being voluntary acts.

2172. The jurisdiction of justices of the peace in Scotland may be said to be wholly statutory.

2173. In the recovery of servants' wages it extends to any amount, "if the servants please rather to pursue before them than any other judge." (Stat. 1661, c. 38.)

2174. Actions for aliment of bastard children are sometimes brought before the justices; but these cases are competent only where the paternity of the child is admitted.

<sup>1</sup> Barclay's Digest of the Law of Scotland for Justices of the Peace, 4th ed. p. 542.

2175. Warrants against debtors, as *in meditatione fuge*, are frequently granted by justices of the peace.

2176. The justices are also in use to ordain parties to find surety to keep the peace. This proceeding, which in the legal phraseology of Scotland is called "a warrant of law-burrows," was more common in former times, when the police regulations were less complete than at present.

2177. It has never been the custom for justices of the peace in Scotland to try criminal cases by a jury, as is common in England. Practically, their criminal jurisdiction is confined to breaches of the peace and trifling assaults; and it is rare for them to inflict a heavier punishment than a small fine or a short imprisonment.

2178. In a case in which the justices imposed a heavy fine for fraud and wilful imposition, the Court of Justiciary remarked that it was not a proper case for their jurisdiction (*Watson and Ramsay v. Meek*, 27th Jan. 1813); and the same observation has been made in other cases.

2179. The Act 19 and 20 Vict. c. 48 (July 14, 1857) assimilates proceedings before justices of the peace and magistrates of burghs to those in the summary trial of offences before the Sheriff, and extends to them the powers conferred on him by 14 and 15 Vict. c. 27, and 17 and 18 Vict. c. 86, in regard to whipping juvenile offenders and imposing hard labour.

2180. The justices possess various statutory powers in reference to revenue matters, highways, fishings, game, public-houses, and the like. Under some of these the jurisdiction of the justices is exclusive; under others, it is cumulative with that of the Sheriff.

2181. The duty of granting licences to publicans to sell excisable liquors to be consumed on the premises, is exercised by the justices in counties, and by the magistrates in royal burghs, at half-yearly meetings appointed to be held for the purpose. (9 Geo. iv. c. 58.) If there are not a sufficient

number of magistrates in a burgh, the justices are empowered to act for them.

2182. As these certificates are in force only for one year, their constant renewal, and the inquiries that are requisite regarding them, cause a great amount of labour to such justices as are conscientious in the discharge of this part of their duty.

2183. Complaints for the violation of this Act are competent either before the Sheriff, the Court of a royal burgh, or two or more justices of the peace.

#### VII. JUSTICES' SMALL DEBT COURTS.

2184. It is chiefly as judges under the various Acts which have been passed during the last seventy years (the first is 35 Geo. III. c. 123 (1795)) to facilitate the recovery of small debts, that the civil jurisdiction of the justices of the peace is practically exercised.

2185. The existing code for their guidance in this branch of their duties is 6 Geo. IV. c. 48 (1825), amended by 12 and 13 Vict. c. 34 (1849).

2186. By the first of these Acts the jurisdiction of the justices is confined to cases not exceeding £5 (sec. 2), and this provision remains unaltered.

2187. The recent statute, by which the jurisdiction of the Sheriffs in their Small Debt Courts is raised from £8, 6s. 8d. to £12 (16 and 17 Vict. c. 80, sec. 26), has no application to the Small Debt Courts either of justices of the peace or of magistrates of burghs.

2188. Parties state their own cases in these courts *viva voce*, and no record is kept either of the arguments or of the evidence.

2189. Procurators cannot practise in them, even with leave of the justices. (6 Geo. IV. c. 48, sec. 5.)

2190. The decrees of the justices in their Small Debt Courts

are subject to review on grounds of malice and oppression. (Ib. sec. 14.)

2191. *The Clerk of the Peace* is not properly an assessor to the justices ; but practically, his opinion is usually asked and followed in matters of law. He is appointed by the Crown.

VIII. THE COURT OF THE LORD LYON.

2192. As chief herald for Scotland, the Lord Lyon, or, as he ought rather to be called, the Lyon King of Arms,<sup>1</sup> exercises jurisdiction over all other heralds, pursuivants, and messengers-at-arms. He admits them to office, superintends them in the discharge of their duties, takes cognisance of complaints against them, and suspends them or deprives them of office when guilty of malversation. (As to cautioners for messengers-at-arms, see *ante*, secs. 1758, 1759.)

2193. The Lyon is also empowered by the statutes 1592, c. 127, and 1672, c. 21, "to inquire into the relationship of the younger branches of families, having right to coat armour, who desire to have the family arms assigned to them with differences ; to assign suitable differences to them accordingly ; and to matriculate them in the register of the office, without which the arms cannot lawfully be borne by them." (Report of the Commissioners on the Courts of Scotland, Lyon Court, p. 15.)

<sup>1</sup> The now prevalent custom of speaking of the *Lord* Lyon, though not entirely destitute of the countenance of earlier usage, seems to have arisen from the accidental circumstance of the present holder of the office, and his immediate predecessor, being peers. In 1587, c. 46, he is throughout called "the Lyon" simply, though the Act speaks of the "Lords of Council and Session ;" the same is the case in 1592, c. 127. But in 1662, c. 53, an Act which never passed the seals, and which was rescinded by 1663, c. 15, he is twice called the *Lord* Lyon, and he is so called also in the repealing statute. The old form, however, is reverted to in the important Act 1672, c. 21, by which the office and court of "the Lyon" were placed on their present footing after the Restoration.

2194. The present register, kept in the Lyon Office, commences in 1672; but that of Sir David Lindsay, of which the original is in the Advocates' Library, is also regarded as forming part of the authentic records of the Lyon Court. The portion of the record having reference to the intermediate period is believed to have formed part of the records contained in the 85 hogsheads which were lost at sea when being returned to Scotland in 1661. (See proceedings relating to the Records of Scotland, Thomson's edition of Acts of Parliament, vol. i. p. 25.)

2195. It further belongs to the Lyon, in virtue of the powers conferred on him by the statutes above mentioned, to grant new coats of arms to "virtuous and well-deserving persons;" which coats it is his duty to adjust, according to the discretion vested in him, but conforming to the laws of arms and the usages of Scottish heraldry. It is also the duty of the Lyon to enforce the penalties imposed by these Acts on those who unlawfully assume coat armour.

2196. In his judicial capacity, it is the duty of the Lyon to investigate and decide upon claims to particular coats of arms or armorial distinctions, such as supporters and the like, and to determine any disputes regarding coat armour which may arise between individual claimants.

2197. In granting new armorial bearings, the Lyon exercises a part of the royal prerogative, and his acts are ministerial and discretionary, not judicial. For this reason, so long as they do not trench on vested rights, they can no more be questioned in a court of review than can the act by which the sovereign directly confers a title of nobility. But the case is different where the Lyon grants to one person arms which another claims a right to bear. Here a question of property arises, and there can be no doubt of the jurisdiction of the Court of Session to entertain an action at the instance of the party alleging himself to be aggrieved. (*M'Donnell v. M'Donald*, Jan. 20, 1826;

Cunningham v. Cunningham, 13th June 1849.) In the former of these cases, Lord Pitmilley remarked, that "even if the Lyon refuse arms to a party entitled, the Court has jurisdiction to give redress." This observation probably had reference to the right of a party to matriculate the arms of an ancestor, and not to the privilege of the Lyon summarily to dismiss an application for new arms, on the ground that, in the exercise of his discretion, he did not conceive the applicant to be a "virtuous and well-deserving person." But where nothing to the prejudice of the applicant is brought under the notice of the Lyon, this privilege, though it undoubtedly exists, has become practically obsolete, it being the invariable practice of the Lyon Court to grant arms to all applicants of Scottish descent, on payment of the customary fees.<sup>1</sup>

2198. In deeds of entail, the heirs called to the succession are frequently enjoined by the entailer to bear his arms; and it has been held by the Court, that where the maker of the entail has no coat armorial recognised on the books of the Lyon, it is incumbent on the heir succeeding, and on the other heirs of entail, to follow out his appointment by obtaining from the Lyon Office arms of the proper description, descendible to the heirs of entail. (Moir, Feb. 5, 1794; Mor. 15537.)

2199. In addition to the injunction that the heir shall bear the arms of the entailer, deeds of entail very often contain the further proviso that he shall bear his name, sometimes even his name exclusively. Where a stranger, or a relative through females, is called to the succession, the former provision almost always implies the assumption of a new name, and the latter the substitution of one name for another. As much confusion exists regarding the formalities supposed to be necessary for

<sup>1</sup> The fees on a grant of new arms usually range between £42 and £50; those on a matriculation, between £16 and £20; the variation being caused by the greater or less amount of historical and genealogical investigation involved.

effecting this object, the following statement of the view of the law by which the practice of the Lyon Office is regulated may not be unacceptable to the reader.

2200. In the case of Alexander Kettle (Jan. 14, 1835, S. and D. xiii. p. 262), a writer to the signet, who presented a petition to the Court of Session, praying the Court to sanction his assuming the name of Young, the Lord President stated it as his opinion, that "there is no need of the authority of this Court to enable a man in Scotland to change his name;" and the petition, at his Lordship's suggestion, was withdrawn as unnecessary. The decision of the Court had no reference to the fact that Mr. Kettle had obtained a royal licence to change his name, but proceeded on the general ground that he was entitled to assume any name he chose. In apparent contradiction to this is the later case of Harry Inglis (Nov. 29, 1837), a writer to the signet, to whom authority was granted to assume the additional name of Maxwell. It is not said that the ground of sustaining the petition was the want of a royal licence, which in the case of Young was regarded as unnecessary, and there is reason to think that it passed without reference to Young's case at all. This view is confirmed by the fact, that in a still more recent case (*Kinloch v. Lowrie*, Dec. 13, 1853) the principle of Young's case was followed; it having been held by the Lord Ordinary (Cowan), and acquiesced in, that "a person may sue under a new name assumed by himself, even though assumed without any royal or judicial authority." The only old case of importance is that of Lord Pitsligo in 1749 (M. p. 4155, voce *Falsa demonstratio*), who was attainted by the name of Alexander, Lord Pitsligo. He claimed his estate as not forfeited, he not having been designed by his true name and title. The Court of Session sustained his claim, but the House of Lords reversed the judgment, as it was proved that he was commonly known by the name of Lord Pitsligo. In the Acts of Sederunt many examples will be found of petitions by members of the College of Justice for authority to change their names, and

these petitions are generally granted ; but all that the Court seems to have done was to authorize the individuals to practise under the new names which they themselves had already assumed. [The last case on this subject is that of Forlong (1880, 7 R. 910), in which the Court refused a petition "to assume and bear the name of 'G.'" "On the best consideration which I can give to the matter," said the Lord President, "I think it would be unwise, if not absolutely beyond our power, to entertain this application."]

2201. In accordance with what thus seems to be the law of Scotland, it is held in the Lyon Office that a man may assume any name he chooses. The Lord Lyon, consequently, will not, as is popularly believed, grant authority to an individual to change his name ; but on the narrative *that he has already changed it*, he will grant him arms under his new name ; and in the patent, or, if desired, in an extract from the record, he will certify the fact of the change. This certificate has been recognised both by the War Office and by the Admiralty as identifying the bearer of the new name with the bearer of the old name, which is the only object of the Queen's letters patent ; and officers in the army and navy have been permitted to change their names on the lists, and to draw their pay under their new denominations.

2202. From a case decided in the Common Pleas (Davies and Wife v. William Selby Lowndes, April 27 and 28, 1835, Bingham's New Cases, i. p. 597), it would seem that, contrary to the general belief, the law on this subject is the same in England as in Scotland. On the point in question, Chief Justice Tindal remarked : "There is no necessity for any application for a royal sign-manual to change the name. It is a mode which persons often have recourse to, because it gives a greater sanction to it, and makes it more notorious ; but a man may, if he pleases, and it is not for any fraudulent purpose, take a name and work his way in the world with his new name as well as he can. It does

not appear to me that that (his not having the sign-manual) is an objection which can, upon the present occasion, succeed." The case was one in which an estate was devised on condition of the devisee's changing his name.

2203. A separate department from the heraldic, and, in the opinion of many, a more useful department of the Lyon Office, is that which has reference to Genealogies. In the exercise of his duty in this department, the Lyon receives evidence of the genealogies of all applicants, quite irrespective of any claim which they may have to be descended of noble or honourable lineage, and records it for preservation in a proper register. To what extent the register of genealogies in the Lyon Office might be admitted as a probative document conclusive of the facts which it sets forth, has not been ascertained by actual decision; but there can be no doubt that, in questions both as to property and honours, it would be regarded as a most important adminicle of proof. The genealogical department of the Herald's College in London is a very important one, and it is to be regretted that the uses of the corresponding department of the Lyon Office are so little understood and appreciated by the public.

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### CHAPTER III.

#### OF THE ECCLESIASTICAL COURTS.

2204. The ecclesiastical jurisdiction of Scotland was constituted, very nearly as it now exists, by an Act of the 12th Parliament of King James VI., in the year 1592.

2205. Having been thus called into existence as a whole at one particular period of our history, and by a class of persons who attached a peculiar value to logical consistency, it is

naturally much more symmetrical than the civil jurisdiction, which has grown up gradually during many centuries.

#### I. THE KIRK-SESSION.

2206. The root from which the whole government of the Presbyterian Church springs is the Kirk-Session. It consists of the minister (or in case of a collegiate charge, the ministers) of the parish and the elders.

2207. The elders are elected by the session, and their numbers are regulated by the exigencies of the parish.

2208. There *must* be two elders at least in every kirk-session. The minister is Moderator of the session ; and if there are two ministers they preside in rotation, the one who is not preses being a constituent member of the session.

2209. A minister and his ordained assistant cannot both be members of the session.

2210. The duties of the session are to superintend and promote the religious concerns of the parish, in regard both to discipline and worship. It is under the former of these heads that the session exercises functions analogous to those of a court of morals. It takes cognisance of scandalous offences, and punishes them, when proved, by deprivation of religious privileges. The discipline of the Church was formerly of a far more positive kind ; but the practice even of public rebuke has now gone entirely into disuse.

2211. The power of disposing of the ordinary church-door collections for the relief of the poor, in so far as formerly vested in the heritors and kirk-session, is transferred to the latter alone in all parishes in which it has been agreed that an assessment shall be levied. (8 and 9 Vict. c. 83, sec. 54 ; see Dunlop's Poor Law, p. 82.)

2212. The session-clerk is bound, under a penalty, to report annually to the Board of Supervision the application of the

collections, and the right of the heritors to examine the accounts of the kirk-session is reserved.

## II. THE PRESBYTERY.

2213. The Presbytery is the court immediately superior to the kirk-session.

2214. The bounds of its jurisdiction are fixed by the General Assembly, which has the power of increasing and diminishing the number of presbyteries. The present number is eighty-two.

2215. "A presbytery," says Dr. Cook (*Styles, Procedure, and Practice of the Church Courts*, p. 41), "consists of the ministers of all the parishes within the bounds of the district; of the professors of divinity of any university that may be situated within the bounds, provided they be ministers; and of an elder for each of the kirk-sessions in the district."

2216. "One of the ministers is chosen to act as Moderator, and it is the general practice that the Moderator elected continues in office for six months."

2217. It belongs to the presbytery to examine candidates for the ministry, and to grant them licences to preach; to take trial of the qualifications of presentees to parishes, and to ordain them and induct them, and thereafter to see that the duties of the ministry are properly performed by them in their respective parishes. In the event of any charge involving censure, suspension, or deposition being brought against any ministers within the bounds, it is the duty of the presbytery to judge in the matter.

2218. To these functions of the presbytery is to be added that of the election of ministers, formerly exercised and now expressly confirmed to them by the Patronage Act. (37 and 38 Vict. c. 82.) By that statute, repealing 10 Anne, c. 12, and 6 and 7 Vict. c. 61, the right of private patronage of vacant churches

and parishes is abolished, and the election and appointment of ministers vested in the congregations, subject to such regulations as may be from time to time framed by the General Assembly ; but reserving to the Church the right to try the qualifications of those appointed, and decide finally on their admission and settlement. The power of determining whether the right of appointment has accrued to the presbytery *tanquam jure devoluto* in particular cases belongs to the Civil Courts, and is not excluded by the terms of the statute. (Stewart (Paisley Case), 1878, 6 R. 178 ; Cassie (New Deer Case), 1878, *ib.* 221.) When no appointment is made within six months of a vacancy, the right of appointment accrues to the presbytery of the bounds, who may proceed to appoint a minister to the vacant charge *tanquam jure devoluto*.

2219. The presbytery is a court of appeal from the kirk-session ; and it is in use to give advice on points referred to it from that body.

2220. The functions of a presbytery as a civil court are confined to judging in the first instance in questions connected with the erection and repair of churches and manse, the excambion of glebes, and the like.

### III. THE SYNOD.

2221. The provincial Synod is superior in powers and in dignity to the presbytery, and intermediate between it and the General Assembly of the Church.

2222. There are now sixteen Synods in Scotland, that of Shetland having been added to the previous number by an Act of the General Assembly in 1830.

2223. The members of all the presbyteries within its bounds are members of Synod, with the addition of two corresponding members, a minister and ruling elder from each of the contiguous Synods.

2224. The Synod usually meets twice a year: the Synod of Argyll only once.

2225. The Moderator of the Synod is always a minister.

2226. The Synod acts generally as a court of appeal from the presbytery; it being incompetent to carry any case directly to the General Assembly, except by special authority from that court, or in the event of no meeting of Synod having intervened.

#### IV. THE GENERAL ASSEMBLY.

2227. The General Assembly is the highest ecclesiastical court in Scotland.

2228. It consists of ministers and elders, who are sent as representatives from all the presbyteries, royal burghs, and universities. The churches in the East Indies in connection with the Church of Scotland are now also represented.

2229. The number of members sent to the Assembly by each presbytery is proportioned to the number of ministerial charges which it embraces. Presbyteries containing not more than twelve ministerial charges, which are the smallest, send two ministers and one ruling elder; whilst those having more than fifty-four send ten ministers and five ruling elders. (Fifth Act of Assembly, 1694, and 1712, c. 6.)

2230. The office of Principal, where the Principal is a clergyman, or of Professor of Divinity in a university, counts as an additional charge. The town of Edinburgh sends two members, and sixty-five other burghs send one each. Each of the four universities sends one, and the churches in India two. Additional members are occasionally added to the Assembly in consequence of the increase made to the numbers of the members of presbyteries by the erection of new churches.

2231. The Assembly meets in Edinburgh annually on the first Thursday after the 15th of May.

2232. The Commissioner, who is appointed to represent the

Crown in the Assembly, takes no share in the debates ; and it has been even maintained that the Assembly may proceed to business without him. Great care, however, is now taken to prevent collision between the powers of the Assembly and the Crown. Though the Commissioner be absent, the Assembly does not resolve itself into a committee, or report its proceedings on his return. Nor does he assert any right to be made acquainted with its proceedings.

2233. When the Moderator appoints the next Assembly to meet on a particular day of the following year, "in the name of the Lord Jesus Christ, the King and Head of the Church," the Commissioner invariably appoints the same day "in the Queen's name."

2234. The first act of the Assembly is to choose a Moderator, who is always one of the ministers on the roll of members of that Assembly. He is usually proposed by the preceding Moderator ; it being competent, however, for any member to propose another candidate. The General Assembly has also a procurator, or assessor, who is always a member of the bar, and an agent, who is a writer to the signet,—principal and depute clerks, printers, and other officials.

2235. The General Assembly acts both in a legislative and a judicial capacity. Legislative measures are introduced in the form of *overtures*—i.e. proposals or suggestions, which may originate with a member of Assembly, a presbytery, a synod, or with a committee appointed by the Assembly itself for the purpose. When an overture has been adopted by the General Assembly, it is transmitted to the several presbyteries, with injunctions to report on it to the next General Assembly. "If the more general opinion of the Church agree thereto" (Barrier Act, Jan. 8, 1697, Act. ix. ; Cook's Practice, 266, 267), that is to say, a majority (or forty-two presbyteries) have reported in its favour, it may then pass into a law. In cases requiring greater despatch, the Assembly is in use to pass interim Acts,

which are binding till the meeting of the next Assembly, and may be continued till the overture either passes into a law or is finally rejected.

2236. Private questions are brought before the Assembly as a court of law by *petition* ; and it is usual for the party to be represented by counsel, who also appear not unfrequently in the inferior ecclesiastical courts, except the kirk-session, before which law agents are not allowed to practise.

2237. The annual session of the General Assembly is ten days, and such business as it is unable to overtake during this time is referred to "*the Commission*."

2238. *The Commission* consists of all the members, with the addition of one minister named by the Moderator. Thirty-one members make a quorum, provided that twenty-one of these are ministers.

2239. The stated meetings of the Commission take place on the day after the dissolution of the Assembly, on the second Wednesday of August, the third Wednesday of November, and the first Wednesday of March ; but it is competent for the Moderator to call a special meeting of the Commission on any emergency.

2240. The proceedings of the General Assembly are generally liable to review in the civil court, when they affect either the patrimonial interest or other civil rights of individuals, and in all cases in which they exceed the power conferred upon them by statute or common law.

2241. The various bodies of Dissenters from the Presbyterian Church of Scotland are governed by organizations distinct from, but analogous to, that of the Established Church.

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## CHAPTER IV.

## OF THE PRACTITIONERS OF THE LAW.

2242. In Scotland, as elsewhere, the practitioners of the law are divided into various classes, who perform functions essentially different.

2243. (1.) *Advocates*.—This is the name by which members of the bar are known in Scotland, as in France. Their position with reference to the other branches of the profession is the same as that of barristers in England.

2244. They possess the exclusive privilege of pleading in the Supreme Courts, and are entitled to plead in all the other courts, civil, criminal, and ecclesiastical, including the House of Lords in Scotch appeals, and the Colonial Courts. The Supreme Judges and principal Sheriffs always, and the Sheriff-substitutes generally, are selected from the bar.

2245. The origin of the profession in Scotland is probably of very early date. In 1424 (1424, c. 24) provision is made for securing the assistance of its members to pauper litigants. But the existence of the Faculty or Society of Advocates is coeval with the institution of the College of Justice, in 1532.

2246. The number of members of this body, which at first was limited to ten, has long been unlimited. At present it consists of about 350 members, perhaps one-fourth of whom are engaged in practice.

2247. The Faculty is presided over by a Dean, elected by its members, who is usually the most prominent practitioner for the time being; and by him, assisted by a council, its affairs are managed.

2248. Admission to the body is preceded by two examinations—the first being in general scholarship, the second in Law

2249. The degree of Master of Arts of any British university, or such a degree of a foreign university as, in the opinion of the Dean and his council, affords evidence of the same amount of scholarship as that afforded by the degree of Master of Arts of a Scottish university, is accepted as an equivalent for the first examination. It is now the almost invariable practice for candidates to produce a diploma in Arts.

2250. A year must elapse between the first examination, or the presentation of the diploma as its substitute, and the second examination in the Civil Law of Rome, International Law, and the Municipal Law of Scotland ; and this examination must be preceded by attendance on the Law classes in the University of Edinburgh.

2251. Both examinations are conducted by persons of learning, usually professors in the University of Edinburgh, who act as assessors to a committee of Faculty appointed by the Dean.

2252. The fees of admission to the Faculty are about £336.

2253. The library of the Faculty of Advocates, which was founded by Sir George Mackenzie in 1682, is the most extensive and valuable in Scotland. It consists of about 300,000 volumes, and is particularly rich in mss. relating to the history of Scotland. It has been already mentioned, under the head of Copyright, that the Advocates' Library is entitled to a copy of every work entered at Stationers' Hall.

2254. (2.) *Writers, or Clerks to the Signet*, are the highest class of law agents.

2255. Their functions in litigation are those of attorneys and solicitors in England, and they also act very extensively as conveyancers and managers of private affairs. When viewed in the latter capacity, they are usually spoken of as agents, commissioners, or factors for the parties.

2256. Prior to the statute 36 and 37 Vict. c. 63, writers to the signet could practise as such only in the Supreme Courts, but they had the privilege of practising before the Sheriff Courts

in all matters that had been transferred by statute from the Supreme Courts to the Sheriff Courts. Under the provisions of the above statute, every enrolled law agent shall, on paying the appropriate stamp duty and subscribing the roll of law agents, be entitled to practise in any court of law in Scotland. Law Agent includes writers to the signet, solicitors in the Supreme Courts, procurators in the Sheriff Courts, and every person entitled to practise as an agent in a court of law in Scotland. Any person may become an enrolled law agent who possesses the qualification of a law agent, or who shall be in the future admitted as a law agent in terms of the provisions of the statute. A roll is also directed to be kept by the clerk of the Lord President of the law agents practising before the Court of Session; and any enrolled law agent who has paid the stamp duty exigible by law on admission to practise as an agent in the Court of Session, shall be entitled to subscribe the said roll, and thereupon to practise as an agent in the Court of Session. In the same way a roll is kept by the Sheriff-clerk of every county, upon subscribing which any enrolled law agent becomes entitled to practise in the Sheriff Courts of that county. But in no case can an agent borrow a Court of Session process unless he has a place of business in Edinburgh or Leith, nor a Sheriff Court process unless he has a place of business within the jurisdiction.

2257. The name (writer to the signet) is said to have originated in the first members of the body having been clerks in the office of the Secretary of State, by whom writs passing the King's signet were prepared; and they still possess the exclusive privilege of preparing the warrants of charters of land flowing from the Crown, of signing summonses citing parties to appear in the Court of Session, and all other writs that pass the signet—as, diligences for affecting the person or estate of the debtor, or for compelling implement of the decrees of the Supreme Court.

2258. The Society is presided over by a Keeper, who usually acts by deputy, and by whom, assisted by certain commissioners named by the Keeper, its affairs are managed.

2259. Admission must be preceded, 1st, by attendance during two different sessions, or three full winter courses of lectures, in the Faculty of Arts of a Scottish university. One certificate must be produced from a professor of Latin, or Humanity, as it is called.

2260. 2d, By an apprenticeship, which must not be entered on under seventeen years of age, and is of five years' duration.

2261. 3d, Attendance on four courses of lectures on Law in the University.

2262. The candidate is also subjected to two trials, a public and a private, in Law, previous to admission.

2263. The apprentice-fee to the master is £100. The payment by the apprentice to the widows' fund is £50, 0s. 1d.; to the general fund of the Society, £131, 1s.; stamp for indenture, £60, 0s. 1d.; and some smaller fees;—the total indenture fees being about £345. At passing, there are further fees of £25, 0s. 1d. for stamp, and of £51, 8s. for Signet fees, on commission; £60 to the Society Fund; and some smaller fees;—the total expenses of entering the body being about £490.

2264. (3.) *Solicitors before the Supreme Courts* are also a corporate body of some antiquity, the members of which, as regards litigation, discharge most of the functions entrusted to writers to the signet, with the exception of signing summonses citing parties to appear in the Court of Session, and other writs passing the signet with a view to securing the debtor's funds.

2265. The apprenticeship of a solicitor is five years; and attendance at the University, though to a more limited extent than in the case of a writer to the signet, is also requisite.

2266. The fees of admission to the body are much more moderate, the whole amounting now to about £55.

2267. *College of Justice*.—All advocates, writers to the signet, and solicitors (*Bruce v. Clyne*, Jan. 24, 1833) before the Supreme Courts are members of the College of Justice.

2268. (4.) *Provincial Writers*.—Writers in provincial towns act not only as procurators before the Sheriff Court, but generally as agents and factors in the conduct of private affairs, in the same manner as the above-mentioned practitioners in Edinburgh. In Glasgow, the procurators are a numerous and important chartered body. In Aberdeen alone, the writers are called advocates, in virtue of a charter.

2269. In cases arising in the provinces, even though likely, from their nature, to terminate in the Court of Session, or to lead to a jury trial in Edinburgh, it is usual to employ a country agent in the first instance.

2270. The writers to the signet, solicitors before the Supreme Courts, and other incorporated legal bodies, may still act upon their own special rules as to admission of members to their respective corporations; but for the future, no person can be admitted as a law agent in Scotland except in accordance with the provisions of the Act 36 and 37 Vict. c. 63. That statute, sec. 5, provides as follows :—

2271. (1.) An applicant for admission must be 21 years of age, and must, except in the cases after mentioned, have served an apprenticeship of five years with a practising law agent, or with a sheriff-clerk in office at the passing of the Act.

2272. (2.) An apprenticeship entered upon after the passing of the Act must be under indenture, which must be recorded in the Register of Probative Writs of the county in which it is entered into, and intimated to the Registrar of Law Agents within six months from the commencement of the apprenticeship, and any assignation of the indenture must be intimated to the Registrar within six months.

2273. (3.) Any person who before the passing of the statute had entered upon an apprenticeship with a master qualified according to the law then existing, with or without indenture, for a shorter term than five years, may serve without indenture, with the same or another master, the additional period necessary to make up five years.

2274. (4.) If from any necessary or reasonable cause the whole period of apprenticeship under an indenture cannot be completed with the master therein named, the remainder may be completed with any other qualified master.

2275. (5.) A master may permit an apprentice to serve any part of his term, not exceeding two years, with any other qualified master.

2276. (6.) Any of the following persons shall be qualified to apply for admission, if he shall have served an apprenticeship as aforesaid for three years, viz :—(a) A person who, either before or after the passing of the Act, shall for five years have been a clerk to, and engaged under the superintendence of, a law agent in such business as is usually transacted by law agents. (b) A person holding a degree in law or in arts of a university in Great Britain or Ireland, granted after examination. (c) A member of the Faculty of Advocates. (d) A person who has been called to the degree of utter barrister. (e) A person who has been admitted and enrolled as an attorney or solicitor in England.

2277. Every person shall, before he be admitted a law agent according to the Act, make affidavit that he has actually served an apprenticeship to a qualified master or masters during the whole time required by the Act. Any person possessing any of the foregoing qualifications may apply to the Court of Session by petition for admission as a law agent, and the Court shall examine and inquire, by such ways and means as they shall think proper, touching the indenture, and service, and fitness, and capacity of such person to act as a law agent, and upon being satisfied admit him.

2278. *Notaries*.—Many of the writers to the signet and other practitioners are also *notaries public*, in which character they protest bills, and prepare notarial instruments of various kinds ; the most important and frequent of which has been nearly superseded by a recent Act (21 and 22 Vict. c. 76), substituting registration of conveyances for instruments of seisin. They also authenticate deeds for those who cannot write.

2279. Notaries are admitted by the Court of Session, after examination by members of the Society of Writers to the Signet. Any enrolled law agent may be admitted by the Court, on petition, to the office of notary public (36 and 37 Vict. c. 63, sec. 18). And any person being a notary public who has, for the seven years immediately preceding the Act, taken out a stamped certificate as required by law, and who for that period has been engaged in actual practice as a law agent or conveyancer as well as notary public, may at any time within one year after the passing of the Act be admitted as a law agent, if the Court think fit, without making an affidavit of having served an apprenticeship, and without being subjected to an examination (Ib. sec. 24).

2280. *Agent and Client*.—No action of damages for negligence or want of skill can be maintained either against a barrister in England or an advocate in Scotland ; and, on the other hand, no action is competent to them for payment of their fees, which, in practice, are consequently always paid in advance ; but such is not the case with an attorney or agent. Questions of much nicety have arisen, and must continue to arise, as to the extent of responsibility which agents incur in the special circumstances of the cases with which they are entrusted. All that can be here attempted is to point out the general rules by which their responsibilities are governed. Like all other professional persons, law agents are presumed to possess such industry and knowledge of their craft as to enable them to practise it with safety to their employer in ordinary circumstances, and they

will therefore be responsible for the consequences of extreme negligence or gross professional ignorance. Their ill success, however, will not support a presumption of want of skill, even though the agent should have predicted a result from his exertions altogether different from that which has occurred. In a leading case in the House of Lords on this subject (*Purves v. Landell*, March 10, 1845, 4 Bell, 46), in which the judgment of the Second Division of the Court of Session, led by the late Lord Justice-Clerk Hope, was reversed, and the interlocutor of Lord Cockburn affirmed, it was held that, "to make a solicitor liable for the consequences of acts done by him in his professional capacity, either in damages or in relief of moneys paid by the client, the summons must expressly aver want of reasonable skill or gross negligence, or show facts necessarily raising an inference of one or other." In delivering the judgment of the House, Lord Brougham said: "I cannot go into the alarming doctrine laid down by the Lord Justice-Clerk, which I hold to be quite erroneous, and which, I think, is not accurately reported. It is said it is unnecessary to allege that Mr. Purves (the agent) was guilty either of want of skill or of negligence. It is enough to allege that what he had done was a nullity. Now, the mere allegation and proof of such a fact as that could never be sufficient; because, unless a great deal more is proved, you may just as well say that every non-suit, or every action that failed, or every case in which what was called an unfructuous proceeding has taken place, even though the attorney should really be successful in the case, yet if, notwithstanding that, there should not be a beneficial result from the action, that would make the attorney liable. No man can possibly conceive that such is the liability of an attorney. There must be considerable mismanagement, considerable ignorance, and the absence of attentive conduct in general. Unless it is gross, the law holds that it is sufficient." In the same case, Lord Campbell remarked, that "the law must be the same in all

countries where law has been considered as a science. The professional adviser has never been supposed to guarantee the soundness of his advice."

2281. In addition to a direct claim against the client for payment of the expenses which he has incurred, and for his own account, a law agent has a preference, of the nature of an hypothec or lien, over such expenses as may be awarded by the Court against the opposite party in a suit; and he has also a right to retain the papers and title-deeds of his client, which have come into his custody in a legitimate manner, until his professional accounts are paid.

2282. A mandate to appear judicially, in name of a party to a suit, is presumed, with respect to a procurator in an inferior court, from his being possessed of that party's writings; and as to an advocate in all the courts, such a mandate belongs to the privilege of his gown.

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## CHAPTER V.

### PRACTICAL SUGGESTIONS WITH REFERENCE TO JUDICIAL PROCEEDINGS.

2283. Were we to attempt to place before our readers anything approaching to an intelligible account of the forms of procedure, either in civil or criminal actions, we should not only exceed the limits, but violate the objects of the present work. These, together with the preliminary diligences which the law has furnished for the protection of property in dispute, are pre-eminently professional subjects; and it is very far from our intention to induce non-professional persons to occupy themselves with such, beyond the extent which may be necessary for their

practical guidance. As regards the conduct of litigation, no such necessity can arise. In the ordinary intercourse of life, any man may be compelled, at any moment, to determine whether or not he shall adopt a course of conduct which may afterwards compel him to become a litigant; but he never can be forced to engage in judicial proceedings with such precipitation, or to conduct them in such isolation, as to deprive him of professional aid; and the soundest advice that can be given him, when about to litigate, is to place himself in the hands of a respectable agent with the smallest possible delay.

2284. All that shall be attempted in the present section, therefore, will be to furnish such information as will enable persons unacquainted with the institutions and professional arrangements of the law of Scotland,—strangers, foreigners, females, and the like,—at once to adopt such measures as will procure them redress of injuries, or enable them to resist aggression.

2285. CIVIL ACTIONS.—(1.) *Small Debt*.—The only court in which parties usually appear on their own behalf is, as we formerly explained, the Small Debt Court.

2286. The first step to be adopted in raising an action before a Small Debt Court is to make application to the clerk of Court (who will usually be found, during business hours, at the County Buildings, both in Edinburgh and in provincial towns) for a printed copy of the form of summons or writ by which the defender is called into Court, which is appended to the statute by which these courts are regulated (1 Vict. c. 41).

2287. This document, being filled up by the complainer with a statement of “the origin of his debt or ground of action, and whenever possible, with the date of the cause of action, or last date in the account” (Schedule A.), and signed by the Sheriff-clerk, is a sufficient warrant to a Sheriff’s officer for summoning the defender to appear and answer at the time and place men-

tioned in the summons and complaint, which must not be sooner than the sixth day after citation.

2288. This writ, and the copy of it served on the defender, is further a sufficient warrant for summoning such witnesses, or the possessors of such documents or other means of proof, as either party may require. (Sec. 3.)

2289. If any witness, or other person thus required for the conduct of the action, who has been cited forty-eight hours before the time of appearance, shall fail to appear, he is liable to the party citing him in a penalty not exceeding forty shillings, unless a reasonable excuse be offered and sustained by the Sheriff.

2290. Though the statutory duties of the clerk of Court are fulfilled when he has furnished the pursuer with the means of raising his action, and enabled both parties to compel the attendance of such witnesses as they may require, he is generally willing to give to either of them whatever further advice or assistance may be requisite.

2291. It is of great importance that both pursuers and defenders in the Small Debt Court should have their witnesses present at the first calling of the cause. It is no doubt in the judge's power to continue or postpone the case, either till the other cases are disposed of, or to a subsequent court-day; but despatch being one of the primary objects of the small debt jurisdiction, he will not generally do so unless a very sufficient reason is stated to him.

2292. The admission of agents is also at the discretion of the judge; but it may be stated, as an almost invariable rule of practice, that their interposition will not be excluded wherever either the circumstances of the party or character of the case render it desirable for the attainment of substantial justice.

2293. (2.) *Ordinary Actions*.—It is one of the constitutional privileges of every British subject to sue and defend in his own person in every court, whether inferior or superior, which

has jurisdiction over him. But the privilege is one so rarely exercised, and the exercise of which is so little expedient, that we cannot regard it as desirable that we should furnish rules for the guidance of the few who may desire to assert it. He who determines to act as his own lawyer must be prepared to encounter the professional skill from which, in an ordinary action, his opponent will not be shut out; and in order to do so with success, he must arm himself with professional weapons. To such a one, as to all the world, the literature of the profession is open; and if he is resolved to cope with those who have received a professional training, he must not stop short with the perusal of elementary works and popular treatises.

2294. LITIGATION BY THE POOR.—In 1424 a statute (1424, c. 45) was passed by the Parliament of Scotland for securing the gratuitous assistance of advocates to the poor (*ante*, sec. 2245), and the privilege thus early conferred on them they have ever since retained. The Court of Session, by Acts of Sederunt passed from time to time, have determined the conditions on which admission to the benefits of the poor's roll should be granted, both in the superior and the inferior courts. Under the existing Act (A. S., 21st Dec. 1842) it is requisite to admission in the Court of Session that each litigant shall procure, 1st, a certificate from the minister and two elders of the parish in which he resided, setting forth his circumstances in conformity with a schedule furnished in the Act; and, 2nd, a report from a board of lawyers, consisting of two advocates, one writer to the signet, and one solicitor, who are appointed annually by their respective bodies, to the effect that he has a "probable cause," that is to say, that his claim is not obviously unfounded. Similar regulations exist in the Sheriff Courts (A. S., 11th July 1839). By the adoption of these rules, the privilege conferred upon persons in indigent circumstances has been prevented from being, as it was formerly, a hardship to their opponents, and a means

of gratifying their own spiteful or vindictive feelings. An exception to the regulations above mentioned has been introduced by the Poor Law Act of 1845 (8 and 9 Vict. c. 83, sec. 74), in the case of a poor person who shall consider the relief granted him to be inadequate, and who shall procure from the Board of Supervision a minute declaring that, in their opinion, he has a just cause of action. The production of this minute at once entitles him to the benefit of the poor's roll in the Court of Session.

2295. **CRIMINAL ACTIONS.**—The excellent institution of public prosecutors, both in the superior and inferior criminal courts of Scotland, relieves private parties in all cases from the necessity of seeking redress for injuries of a criminal nature by their own means.

2296. When an offence is committed, all that is requisite is, that the Procurator-Fiscal be made acquainted with the whole circumstances attending it with the smallest possible delay, either through the interposition of the police, or directly. A warrant for the apprehension, examination, and, if necessary, the incarceration of the suspected offender, will then be procured from a magistrate on his application; and all other necessary steps will be taken by his instructions for prosecuting the offence, either in the inferior or superior courts, according to its nature or the previous character of the offender.



## APPENDIX.

### I.

IN an action of divorce at the wife's instance, on the ground of desertion, her adultery during the period when the husband is in desertion is a sufficient justification for his non-adherence, and if it be shown to have occurred, divorce will not be granted. (Auld, October 31, 1884.) In this case, observations were made by the judges of the First Division questioning the *dicta* in the case of Muir (*supra*, sec. 244).

### II.

In the case of M'Kinnon (1884, 11 R. 676), the Court accepted the bond of the National Guarantee and Suretyship Association instead of a private bond of caution for a *curator bonis*.

### III.

The Trusts (Scotland) Amendment Act, 1884 (47 and 48 Vict. c. 63), which is to be construed along with the other Trust Acts, has repealed sec. 5 of the Act of 1867 (*supra*, sec. 1029), and extended the area of trust investments by authorizing trustees, except where specially prohibited by the constitution of the trust, to invest trust funds,

(a) In the purchase of—

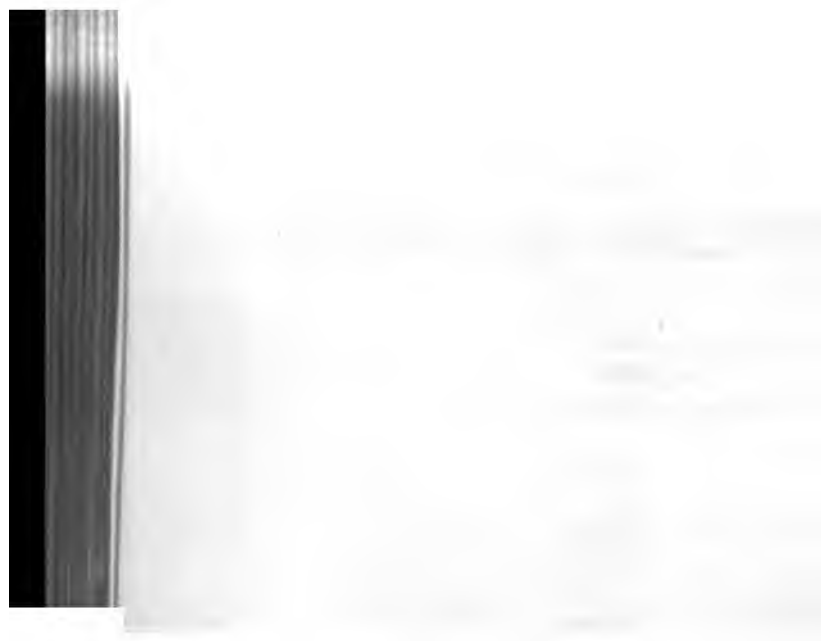
1. Any of the Government stocks, public funds, or securities of the United Kingdom :
2. Stock of the Bank of England :

3. Any securities the interest of which is or shall be guaranteed by Parliament :
  4. Debenture stock of railway companies in Great Britain incorporated by Act of Parliament :
  5. Preference, guaranteed, lien, annuity, or rentcharge stock, the dividend on which is not contingent on the profits of the year, of such railway companies in Great Britain as have paid a dividend on their ordinary stock for ten years immediately preceding the date of investment :
  6. Stock or annuities issued by any municipal corporation in Great Britain, which annuities, or the interest or dividend upon which stock are secured upon rates or taxes levied by such municipal corporation under the authority of any Act of Parliament :
  7. East India Stock, stocks or other public funds of the government of any colony of the United Kingdom approved by the Court of Session, and also bonds or documents of debt of any such government approved as aforesaid, provided such stocks, bonds, or others are not payable to the bearer :
  8. Feu-duties or ground-annuals.
- (b) In loans—
9. On the security of any of the stocks, funds, or other property aforesaid :
  10. On real or heritable security in Great Britain :
  11. On debentures or mortgages of railway companies in Great Britain incorporated by Act of Parliament :
- “Trust” includes any trust constituted by any deed or other writing, or by private or local Act of Parliament, or by resolution of any corporation or public or ecclesiastical body, and the appointment of any tutor, curator, or judicial factor by deed, decree, or otherwise ; and “trustee” includes tutor, curator, and judicial factor.

## IV.

An undischarged bankrupt (*i.e.* a person whose estate has been sequestered, or in respect to whom a decree of *cessio bonorum* has been pronounced, and who has not received his discharge) obtaining credit from any one to the extent of £20, without informing him of the fact of his being an undischarged bankrupt, is guilty of a crime and offence as defined by the Debtors Act, 1880.

An undischarged bankrupt is incapable of sitting or voting in the House of Lords, or being elected a representative Peer, or of being elected to, or sitting or voting in, the House of Commons, or filling the office of Justice of the Peace, Provost, Bailie, Treasurer, Dean of Guild, Deacon, Councillor of Trades, or Councillor, or Commissioner, or Magistrate of Police, Member of a Parochial or School Board, Road Trustee, member of any local authority under any Act relating to local government; and any holder of any such office becoming bankrupt *ipso facto* vacates his office (47 and 48 Vict. c. 16, incorporating certain sections of the English Bankruptcy Act of 1883).



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